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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MALLEABLE IRON RANGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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MALLEABLE IRON RANGE COMPANY

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QUESTION PRESENTED

Whether the Board properly concluded that nonmanagerial "confidential employees" are entitled to the full protection of the National Labor Relations Act unless they assist and act in a confidential capacity to officials who formulate, effectuate, and determine labor-relations policies, or regularly have access to information concerning anticipated changes that may result from collective-bargaining negotiations.

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit in these cases.[1]

OPINIONS BELOW

The opinion of the court of appeals in *Hendricks* (App. A, *infra*, 1a-13a) is reported at 627 F.2d 766. The supplemental decision and order of the National Labor Relations Board (App. C, *infra*, 16a-21a), on prior remand from the court of appeals, are reported at 247 N.L.R.B. No. 68. The opinion of the court of appeals remanding the case to the Board (App. D, *infra*, 22a-32a) is reported at 603 F.2d 25. The Board's original decision and order (App. E, *infra*, 33a-55a) are reported at 236 N.L.R.B. 1616.

The opinion of the court of appeals in *Malleable* (App. F, *infra*, 56a-60a), is not reported. The decision and order of the Board (App. H, *infra*, 62a-75a) are reported at 244 N.L.R.B. No. 64. The Regional Director's decision and direction of election in the underlying representation proceeding (App. I, *infra*, 76a-94a) are not reported.

JURISDICTION

The judgment of the court of appeals in *Hendricks* (App. B, *infra*, 14a-15a) and the judgment of the court of appeals in *Malleable* (App. G, *infra*, 61a) were entered on July 21, 1980. On October 8, 1980, Justice Stevens extended the time for filing the peti-

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[1] Because these cases were decided by the same court and involve the same question of law, a single petition has been filed under Rule 19.4 of the Rules of this Court.

tion for a writ of certiorari to and including November 18, 1980. On November 10, 1980, Justice Stevens further extended the time for filing the petition for a writ of certiorari to and including December 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the National Labor Relations Act, 29 U.S.C. 152, provides in relevant part:

When used in this subchapter—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or dis-

cipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), provides in relevant part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such

purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *.

STATEMENT

A. Hendricks

1. On May 9, 1977, the general manager of Hendricks County Rural Electric Membership Corporation discharged his secretary, Mary Weatherman, because she had signed a petition calling for the reinstatement of Lloyd Hadley, a close friend and fellow employee, who had lost an arm in the course of his employment.[2] Weatherman subsequently filed with the National Labor Relations Board an unfair labor practice charge, in which she alleged that the discharge violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). Hendricks defended against the charge by claiming, among other things, that Weatherman was not entitled to statutory protection because, as secretary to the general manager, she was a "confidential employee" excluded from the coverage of the Act. The administrative law judge who heard the evidence determined that Weatherman was an employee within the protection of the Act, and that she had been discharged because she had engaged in concerted activity protected by Section 7 of the Act, 29 U.S.C.

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[2] Hadley became disabled in February 1976. In March 1977, he sought reemployment with Hendricks, but his application was denied. Subsequently, Weatherman and 25 other employees signed a petition that was addressed to the company's board of directors and urged reconsideration of that decision. When Wallace Dillon, the general manager, learned that the petition had been signed by Weatherman, an employee of nine years' standing, she was immediately discharged (App. E, *infra*, 38a-43a).

157. The Board affirmed the decision of the administrative law judge and ordered Weatherman's reinstatement. Applying the "labor nexus" test enunciated in *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956), the Board found that Weatherman was not a "confidential employee" for purposes of the Act because she did not "assist and act in a confidential capacity to [a] person[] who formulate[s], determine[s], and effectuate[s] management policies in the field of labor relations" (App. E, *infra*, 33a-35a, 43a-49a; emphasis in original).[3]

The court of appeals sustained the Board's findings that Weatherman had been discharged for engaging in protected activity, and that she was not a "confidential employee" under the "labor nexus" standard that the Board had "historically" applied (App. D, *infra*, 24a-25a, 27a, 30a).[4] On the basis of this Court's deci-

[3] Although "confidential employees" are not excluded from protection under the definition of "employee" contained in Section 2(3) of the Act, 29 U.S.C. 152(3), the Board, for policy reasons, has long excluded such employees from bargaining units covering other employees, but only if they meet the Board's "labor nexus" test. See pages 15-18, 20-21, *infra*. The Board has held, however, that even "confidential employees" who meet the "labor nexus" test are protected, as Section 2(3) employees, against retaliatory discharges and other coercive conduct directed at their involvement in activities protected by Section 7 of the Act, 29 U.S.C. 157. See *Southern Greyhound Lines, Div. of Greyhound Lines, Inc.*, 169 N.L.R.B. 627 & n.2 (1968), enforced, 426 F.2d 1299, 1301 (5th Cir. 1970). But see *NLRB* v. *Wheeling Electric Power Co.*, 444 F.2d 783 (4th Cir. 1971). Accordingly, the Board held alternatively (App. E, *infra*, 44a) that Weatherman was entitled to statutory protection against retaliatory discharge even if she were a "confidential employee" meeting the "labor nexus" test.

[4] The court of appeals also sustained the Board's finding that Hendricks had violated Section 8(a)(1) of the Act, 29

sion in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), however, the court of appeals held that "*all* secretaries working in a confidential capacity, without regard to labor relations, [must] be excluded from the Act" (App. D, *infra*, 31a; emphasis in original). The court held that the Board's application of the "labor nexus" test was therefore an "error of law" and remanded the case to the Board to determine whether, " 'by the nature of [her] duties[,]' " Weatherman was " 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer' " (App. D, *infra*, 27a-31a).[5]

2. On remand, the Board accepted the standard enunciated by the court of appeals as "the law of this case only" (App. C, *infra*, 18a-19a).[6] Applying that standard, the Board again determined that Weatherman was not a "confidential secretary," and it reaffirmed its original order. The Board stated (App. C, *infra*, 20a):

U.S.C. 158(a)(1), by coercively interrogating another employee concerning the protected concerted activities (App. D, *infra*, 24a n.1; App. E, *infra*, 52a-53a).

[5] Judge Bonsal, sitting by designation, dissented on the need for a remand, stating that he would enforce the Board's order because the record satisfied him "that Mary Weatherman was not a 'confidential secretary' and was covered by the Act" (App. D, *infra*, 32a).

[6] That the remand was accepted does not now preclude the Board from seeking review of the legal principle governing the remand. See *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1963); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916). See also *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

> [F]or Weatherman to qualify as a confidential employee under the standard erected by the court, the record would have to disclose that she performed confidential duties in connection with nonlabor relations or personnel areas. Quite clearly, however, the evidence taken at the hearing contains no hint that Weatherman had any such responsibilities.[7] That this was not merely an oversight in the course of litigation is confirmed by [General Manager] Dillon's statement that [Hendricks] simply did not have secret papers or documents.

By divided vote, the court of appeals denied enforcement (App. A, *infra*, 6a-8a). The Court reaffirmed its earlier holding that this Court's decision in *Bell Aerospace* required the rejection of the Board's traditional "labor nexus" test and compelled

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[7] Specifically, the Board found that Weatherman was responsible, as secretary to the general manager, for answering his telephone, typing his correspondence, and opening that portion of his mail that was not first removed by the office manager. With respect to the letters that Weatherman typed, the Board found no evidence to show that they concerned confidential matters of any description. With respect to her mail duties, the Board noted that certain significant incoming mail, such as correspondence from Hendricks' attorneys concerning labor negotiations, was removed by the office manager and given directly to the general manager, without having crossed Weatherman's desk. Weatherman placed a few of the general manager's telephone calls, but she did not keep account of his appointments. Weatherman did not attend meetings of management or the board of directors and, although she was responsible for typing the minutes of the directors' meetings, the Board found that these documents did not contain confidential information because the general manager conceded that Hendricks kept no secret papers or documents (App. C, *infra*, 19a-20a).

the conclusion that all "confidential employees" are excluded from the Act. While acknowledging (App. A, *infra*, 3a-4a) that this Court in *Bell Aerospace* held only that "all employees properly classified as 'managerial,' rather than just those in positions susceptible to conflicts of interest in labor relations" are excluded from the Act, the court of appeals noted that the Court, in reaching this conclusion, had relied at least in part upon the premise "that 'confidential employees' were excluded from coverage under a 'broad definition' not limited to those having a labor nexus." The court of appeals then held that the Board's finding, that Weatherman was not a "confidential employee" under the court's prior decision, was not supported by substantial evidence on the record as a whole. The court noted (App. A, *infra*, 8a) that the Board, in reaching its conclusion, had relied upon the general manager's statement at the hearing that Hendricks "simply did not have secret papers or documents." Giving a narrower construction to the evidence, however, the court found (*ibid.*; emphasis by court) that the general manager had stated only that the cooperative "had 'nothing to hide from its *members*.'" The court concluded (*ibid.*):

> That a company has no secrets from its members does not mean that it does not have matters or documents which are confidential insofar as its non-confidential employees are concerned, insofar as its competitors are concerned, insofar as regulatory agencies are concerned, and insofar as the public is concerned.

Judge Cudahy dissented. He noted at the outset that, in light of the court's prior decision in this case, the exclusion of "a confidential *secretary* * * * from

the protection of the Labor Act (whether or not the confidences are labor relations-related) * * * is, for better or for worse, the present law of this Circuit" (App. A, *infra*, 9a; emphasis in original; footnote omitted). At the same time, he found "abundant evidence in the record to support the Board's conclusion that Weatherman is not properly classified as a confidential secretary" (App. A, *infra*, 9a-10a).[8] Moreover, Judge Cudahy noted that there was no authority to support the majority's broader holding that all " 'confidential employees' (not limited to secretaries and, of course, not limited by the labor relations' nexus) are unprotected under the Act" (App. A, *infra*, 10a-11a). Finally, he stated (App. A, *infra*, 12a-13a; emphasis in original; footnotes omitted):

> To paint with a broad brush about the purported exclusion of "confidential employees" (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most*, white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records—the list is

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[8] Judge Cudahy observed (App. A, *infra*, 10a; emphasis in original):

> [Hendricks'] strongest (or at least most fully developed) argument to the contrary seems to be that Weatherman was responsible for processing employees' medical and disability insurance claims—admittedly confidential. But these were the confidences of *employees* she had to keep. It is simply ludicrous that one should be classified as part of "management" and lose the protections conferred on "labor" because one is entrusted with the confidences of one's fellow workers.

endless. I do not perceive at all that the dicta of *Bell Aerospace* point down this road.

B. Malleable

On December 18, 1978, Local 39, Office and Professional Employees Union, AFL-CIO, filed a representation petition seeking certification as the bargaining agent for a residual unit of office clerical, technical, and professional personnel employed by Malleable Iron Range Company at its Beaver Dam, Wisconsin, facility (App. F, *infra*, 56a-57a). At the representation hearing that was subsequently held, Malleable claimed, *inter alia*, that 18 of the approximately 64 residual employees were excluded from the Act by reason of their access to allegedly confidential—albeit not labor-related—business information.[9]

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[9] Specifically, Malleable contended that the following employees should be denied the protection of the Act: (a) three draftsmen who have access to product development information that is not available to other persons; (b) four technical service-engineers who have access to confidential information concerning manufacturing costs, product performance test results, and patentable product development information, all of which is not generally available to employees or the public; (c) a salesman who has access to customer lists; (d) three distribution-traffic-product service manager assistants who have access to credit data considered confidential as to competitors, confidential information pertaining to potential product liability matters, and confidential distributor and dealership lists; (e) the advertising manager, who has access to confidential customer and distributor lists; (f) the assistant cost department manager, who is privy to confidential cost and price information, including the company's profit percentages; (g) the assistant computer service manager, who has access to financial reports, such as sales-cost analyses, which are confidential and not generally available to

Applying the Board's "labor nexus" test, the Regional Director found that these employees were properly included in the bargaining unit because none of them worked "in a confidential capacity for a person involved in the formulation, determination and effectuation of the Employer's labor relations policies" (App. I, *infra*, 82a, 84a, 85a, 89a, 90a). The Union prevailed in the election by a vote of 40 to 15, and it was certified by the Board (App. H, *infra*, 65a, 68a). Malleable refused to bargain, however, and contested the validity of the certification. The Union subsequently filed charges with the Board, which found that the refusal to bargain had violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158 (a)(1) and (5), and the Board issued a bargaining order (App. H, *infra*, 68a-70a).

By divided vote, the court of appeals denied enforcement, stating that (App. F, *infra*, 58a):

> [Malleable] has contended that at least 18 of its employees should be excluded from the unit because they have access to confidential information and are therefore confidential employees. The Board conceded that in determining the employees included in the unit it applied "the Board's traditional 'labor nexus' test" and not the test or standard established in *Hendricks*.

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employees or the public; (h) the assistant credit department manager who has access to accounts receivable information; (i) a computer operator who has access to management-type financial reports such as sales-cost analysis reports; (j) the assistant bookkeeper, who has access to confidential information concerning accounts payable and cash receipts; and (k) the secretary to the company's industrial sales manager, who has access to confidential information concerning costs and anticipated price increases (Ct. App. Br. 21, 28, 27-28, 31-42).

Accordingly, the court remanded the case to the Board for reconsideration under *Hendricks* (App. F, *infra*, 59a).[10]

REASONS FOR GRANTING THE PETITION

For at least 40 years, the Board has ruled that only those "confidential employees" who have access to confidential information relating to labor-relations matters should be accorded less than the full protection of the National Labor Relations Act. By contrast, the holdings of the court of appeals in these two cases would exclude from the coverage of the Act all employees who " 'by the nature of [their] duties [are] * * * given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer' " (App. D, *infra*, 31a). The broad exclusionary rule articulated by the court of appeals is contrary to principles that have long been applied by the Board and approved by the courts of appeals, and its application will materially affect the Board's administration of the Act by excluding countless white-collar and other employees who have previously been protected. The decisions of the court below have created a conflict among the circuits concerning an important question of federal law that warrants review by this Court.

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[10] Judge Cudahy dissented from the remand order with respect to 17 of the 18 employees whose coverage was at issue (App. F, *infra*, 60a). He conceded, however, that a remand "might be needed" under the court's first decision in *Hendricks* with respect to the secretary to the company's industrial sales manager, the "[o]nly one of the challenged employees [who] is a secretary" (*ibid.*).

1. The court of appeals held that its broad formulation of the exclusionary rule was compelled by this Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974). Prior to *Bell Aerospace*, the courts of appeals had uniformly upheld the Board's position that only those "confidential employees" with access to confidential labor-related information should be accorded a special status under the Act. See, *e.g.*, *Service Technology Corp.*, 196 N.L.R.B. 1036, 1040-1041, 1043 (1972), enforced, 480 F.2d 923 (5th Cir. 1973) (table), cert. denied, 415 U.S. 948 (1974); *Westinghouse Electric Corp.* v. *NLRB*, 398 F.2d 669, 670 (6th Cir. 1968); *NLRB* v. *Quaker City Life Insurance Co.*, 319 F.2d 690, 692, 694 (4th Cir. 1963); *NLRB* v. *Armour & Co.*, 154 F.2d 570, 573-574 (10th Cir. 1945), cert. denied, 329 U.S. 732 (1946); *NLRB* v. *Poultrymen's Service*, 138 F.2d 204, 210-211 (3d Cir. 1943).

Moreover, while the Seventh Circuit found that its rejection of the Board's "labor nexus" test was compelled by this Court's decision in *Bell Aerospace*, no other court of appeals has so held in the six years since that decision. In *Union Oil of California, Inc.* v. *NLRB*, 607 F.2d 852, 853-854 (1979), for instance, the Ninth Circuit upheld the Board's determination that three computer operators, who were responsible for computer entry and extraction of confidential business information, were not "confidential employees" for purposes of the Act. In approving the Board's "labor nexus" test, the court noted that the Board's narrow definition of "confidential employee" was reasonable "[b]ecause most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively" (*id.* at 853). Similarly,

in *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 648 (1977), the Sixth Circuit held that the Board had properly "declined to treat secretaries as confidential unless the managers for whom they work are sufficiently engaged in labor-maangement negotiations to warrant exclusion of their secretaries from the benefits of collective bargaining representation." [11] Accord, *NLRB* v. *Hoerner-Waldorf Corp.*, 525 F.2d 805, 807-808 (8th Cir. 1975) (enforcing bargaining order for a unit including two employees found not to be "confidential employees" under the "labor nexus" standard).

In these circumstances, the Seventh Circuit's rejection of the Board's "labor nexus" test for determining the status of "confidential employees" under the National Labor Relations Act clearly warrants review.

2. Unlike the broad exclusionary rule articulated by the court below, the Board's "labor nexus" test accords with the overall policy and legislative history of the National Labor Relations Act.

a. The statutory definition of "employee" does not purport to exclude "confidential employees" from the coverage of the Act. See Section 2(3) of the Act, 29 U.S.C. 152(3). Shortly after the Act became law, however, the Board determined as a matter of statutory policy that employees with access to confidential labor-related information should be excluded from bargaining units comprised of employees who did not

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[11] The court disagreed with the Board's application of the standard to the facts presented, however, and held that the two secretaries involved had a sufficient "labor nexus" to require their exclusion from the bargaining unit (*id.* at 648-650).

have access to such information. See, *e.g.*, *Creamery Package Manufacturing Co.*, 34 N.L.R.B. 108, 110 (1941) (excluding stenographer who took dictation concerning labor problems at plant); *Paramount Pictures, Inc.*, 45 N.L.R.B. 116, 122-123 (1942) (excluding payroll auditors with access to personnel records). In *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944) (footnote omitted), the Board explained:

> [I]n negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. Consequently, we have adhered to the opinion that the management should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal and who in the normal performance of their duties may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.[12]

Accord, *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939).

The narrow scope of this exclusionary rule was underscored by the Board's consistent refusal to exclude from bargaining units employees with access to non-labor-related confidential business information, on the ground that "the possession of important information is of itself insufficient to justify exclusion from the right to collective bargaining." *Creamery Package Manufacturing Co.*, *supra*,

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[12] The Board there found inappropriate even a separate unit of employees with access to confidential labor-related information because the union seeking to represent them also represented the employer's production and maintenance complement. Accord, *Electric Boat Co.*, 57 N.L.R.B. 1348, 1349 (1944).

34 N.L.R.B. at 111.[13] The Tenth Circuit correctly explained the rationale for the Board's rule in 1945 when it noted, in sustaining the certification of a unit of plant clerks who collected and tabulated confidential business data, that the clerks could properly be required to treat such information as confidential, but that "exclusion from the Act is not the price of honest and faithful service." *NLRB* v. *Armour & Co.*, 154 F.2d 570, 574 (10th Cir. 1945), cert. denied, 329 U.S. 732 (1946), enforcing 54 N.L.R.B. 1005 (1944). Accord, *Armour & Co.*, 49 N.L.R.B. 688, 690-691 (1943); *Credit Bureau of Greater Boston, Inc.*, 73 N.L.R.B. 410, 412-413 (1947).

In 1946, the Board stated the "labor nexus" test in somewhat narrower terms. In *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946), the Board determined that the exclusion of all employees with *mere access* to confidential labor-related matters was "too inclusive and needlessly precludes many employees from bargaining collectively together with other workers

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[13] The Board thus refused to exclude from bargaining units various employees who had access to non-labor-related confidential information. See, *e.g.*, *Bull Dog Electric Products Co.*, 22 N.L.R.B. 1043, 1046 (1940) (draftsmen and engineers with access to "confidential matters"); *Creamery Package Manufacturing Co., supra*, 34 N.L.R.B. at 110-111 (blueprint machine operator with access to confidential documents); *Poultrymen's Service Corp.*, 41 N.L.R.B. 444, 447-448 (1942), enforced, 138 F.2d 204 (3d Cir. 1943) (office employees with access to "important" business information); *General Motors Corp., Chevrolet Motor Div.*, 58 N.L.R.B. 1096, 1102 (1943) (clerk trainees with access to machinery production schedules, cost records, and trade secrets); *Bell Aircraft Corp.*, 56 N.L.R.B. 1356, 1359 (1944) (laboratory employees performing "secret" work on war products); and *American Smelting and Refining Co.*, 61 N.L.R.B. 506, 508 (1945) (bookkeeper with access to all financial records of employer).

having common interests." Finding appropriate a bargaining unit composed of time-study employees, the Board thus limited the exclusionary rule to "only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." Accord, *St. Louis Independent Packing Co.*, 67 N.L.R.B. 543, 547-549 (1946); *Brown & Sharp Mfg. Co.*, 68 N.L.R.B. 487, 489 & n.3 (1946).

b. In 1947, the House passed legislation that would have excluded from the Act a broad class of supervisory employees, as well as time-study personnel, plant guards, persons working in labor-relations and personnel departments, and confidential employees. H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947).[14] Moreover, the House bill defined "confidential employee" as "any individual * * * who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." H.R. 3020, *supra*, § 2(12)(C). The House recognized that its bill contained an exclusionary rule more expansive than that which the Board then ap-

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[14] At that time, the Board's practice was to treat supervisors, time-study personnel, plant guards, and confidential employees as persons protected by the Act. See, *e.g.*, *Packard Motor Car Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945), aff'd, 330 U.S. 485 (1947) (supervisory foremen); *Ford Motor Co.*, 66 N.L.R.B. 1317, 1321-1322 (1946) (time-study personnel); *Yellow Truck and Coach Manufacturing Co.*, 39 N.L.R.B. 14, 17-18 (1942) (plant protection employees); *Bethlehem Steel Co.*, 63 N.L.R.B. 1230, 1232 (1945) (confidential employees).

plied. H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947).

The Senate, on the other hand, passed legislation that rejected the House's broad definition of "supervisor" and contained no exclusion for time-study personnel, plant guards, individuals working in labor-relations and personnel departments, or confidential employees of any description. S. 1126, 80th Cong., 1st Sess. § 2(11) (1947). Indeed, the Senate bill expressly included "professional employees" within the coverage of the Act, thereby encompassing many individuals who necessarily would have been excluded under the House definition of "confidential employees." S. 1126, *supra*, § 2(12).[16]

In conference, the Senate's view prevailed, and professional employees were specifically accorded the protection of the Act. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947). Moreover, the conferees accepted the Senate's narrower definition of "supervisor" and declined to include the House bill's specific exclusion of persons working in labor-relations and personnel departments, time-study personnel, guards, and confidential employees. The report stated (*id.* at 35):

> The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate

[16] The Senate report expressed the view that the organizational rights of architects, chemists, engineers, lawyers, and scientists should be protected, and that such employees should be allowed to form separate bargaining units. S. Rep. No. 105, 80th Cong., 1st Sess. 11, 19 (1947). It was recognized that such individuals invariably handle confidential information that is not available to the public, to competitors, or to employees generally. See 93 Cong. Rec. 3733, 3739 (1947) (Rep. Jackson).

> amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. * * *

c. The Board continued after the enactment of the 1947 amendments to exclude from bargaining units of other employees only those confidential employees with a "labor nexus." In *Art Metal Construction Co.*, 75 N.L.R.B. 80, 83-84 (1947), for instance, the Board excluded an employee who typed confidential labor relations reports, but refused to exclude a second employee, whose work concerned only non-labor-related confidential business information.[16] The Board has since continued to exclude from bargaining units only those employees with access to confidential information who "assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations" (*B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956) (emphasis in original)), or who "regularly have access to information concerning anticipated changes which may result from collective-bargaining

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[16] See also *Chrysler Corp.*, 76 N.L.R.B., 50, 53 (1948) (declining to exclude office employees with access to confidential business and financial records); *Sargent & Co.*, 95 N.L.R.B. 1515, 1518 & n.11 (1951) (declining to exclude research mechanic with access to trade secrets).

negotiations." *American Radiator & Standard Sanitary Corp.*, 119 N.L.R.B. 1715, 1720 (1958).[17] Accord, *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 N.L.R.B. No. 54 (Nov. 21, 1980).

In sum, the decisions below are inconsistent with the legislative and administrative history of the Act.

3. The court of appeals erred in holding that rejection of the Board's "labor nexus" test was required by this Court's decision in *Bell Aerospace*. In *Bell Aerospace*, the Court rejected the Board's view that only those "managerial" employees[18] susceptible to conflicts of interest in labor-relations matters should be excluded from the Act, holding that all truly "managerial" employees are excluded (416 U.S. at 274, 289). First, the Court noted that the Board had, until 1970, consistently excluded all "managerial" employees from bargaining units composed of other employees (*id.* at 275-277, 285-288). Second, the Court found that the Act's essential distinction between management and labor could not be maintained without the exclusion of all managerials (*id.* at 282, 284-285 & n.13). Finally, the Court noted that the legislative history of the 1947 amendments showed that Congress believed that certain categories of employ-

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[17] Compare *American Lithofold Corp.*, 107 N.L.R.B. 1061, 1064-1065 (1954) (excluding bookkeepers who are informed of possible wage increases for purposes of setting aside necessary funds), with *American Radiator, supra*, 119 N.L.R.B. at 1720 (including personnel clerk who compiles statistical data, but has no knowledge of labor policies which may result therefrom).

[18] Managerial employees are employees who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer' " (416 U.S. at 288).

ees, including certain confidential employees, were so clearly beyond the protection of the Act that no specific exclusionary provision was deemed necessary. The Court inferred that " 'managerial employees' were paramount among this impliedly excluded group" (*id.* at 283-284).

The Seventh Circuit, in reaching the conclusion that *Bell Aerospace* mandates the exclusion from coverage of all "confidential employees," relied on this Court's observation (416 U.S. at 283-284 & n. 12) that the 1947 Conference Committee indicated its intention to adopt the House bill's broad exclusion for confidential employees by reporting (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947)) that "it was not the intention of the conferees to alter * * * in any respect" the Board's "prevailing practice" of treating "such people as confidential secretaries" as "outside the scope of the Act." As we have shown (pages 18-20, *supra*), however, the conferees specifically rejected the House bill's broad exclusion, and followed the Senate version by including various groups of professional employees who would by definition have routine access to confidential information.[19] Moreover, the conferees noted their approval of the "prevailing Board practice," and that practice—which had been consistently followed for at least eight years prior to 1947—merely accorded a special status to confidential employees meeting the "labor nexus" test,

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[19] It would make no sense to include within the coverage of the Act a research chemist having access to trade secrets, while excluding his "confidential" secretary or clerk. That result would not further the public policy of the Act, and it is one that should not be embraced without clear evidence that Congress so intended.

and excluded such employees only from membership in bargaining units composed of other employees.[20]

Moreover, the Act's fundamental distinction between workers and management—the principal public policy justification for excluding from coverage all truly "managerial" employees—does not require the same result with respect to all "confidential employees." As the Court noted in *Bell Aerospace*, "managerial" employees have "abandoned the 'collective security' of the rank and file because they believe the opportunities thus opened to them to be more valuable to them than such 'security' " (416 U.S. at 281 n.11, quoting H.R. Rep. No. 245, *supra*, at 16-17). As defined by the court below, however, "confidential employees" are manifestly "workers" rather than "bosses." There is no basis for asserting that "confidential employees" have chosen to "abandon[] the collective security of the rank and file voluntarily." Such persons have become "confidential employees" only because their employers have chosen, for their own purposes, to have them handle, often in an essentially ministerial fashion, certain information that the employers would prefer not to have disseminated

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[20] The Board has otherwise treated such employees as protected under the Act. See, *e.g.*, *Southern Colorado Power Co.*, 13 N.L.R.B. 669, 710 (1939), enforced, 111 F.2d 539 (10th Cir. 1940); *Coopersville Cooperative Elevator Co.*, 77 N.L.R.B. 1083, 1084-1085 & n.6 (1948); *American Book-Stratford Press, Inc.*, 80 N.L.R.B. 914, 915 (1948); *Southern Greyhound Lines, Div. of Greyhound Lines, Inc.*, 169 N.L.R.B. 627 & n.2 (1968), enforced, 426 F.2d 1299, 1301 (5th Cir. 1970); *Service Technology Corp.*, 196 N.L.R.B. 1036, 1043 (1972), enforced, 480 F.2d 923 (5th Cir. 1973) (table); *Peavey Co.*, 249 N.L.R.B. No. 110, slip op. 2-3 n.3 (May 27, 1980). But see *NLRB* v. *Wheeling Electric Power Co.*, 444 F.2d 783 (4th Cir. 1971).

widely. The Board has thus properly concluded that "confidential employees" are entitled to the full protection of the Act unless they have access to labor relations information which, if it were revealed, would give their bargaining representative an unfair advantage in dealing with their employer.

4. The Seventh Circuit's exclusionary rule, which excludes all employees with access to business information that the employer would keep confidential insofar as other employees, competitors, regulatory agencies and the public are concerned (App. A, *infra*, 8a), would exclude countless employees who have previously been entitled to the protection of the Act. While Judge Cudahy correctly noted in dissent that the majority's decision "strike[s] a major blow at white collar unionism" (App. A, *infra*, 12a), the effect of these decisions is more far-reaching than that. The rationale of the decisions below would also exclude from the protection of the Act many blue collar workers who may receive information in the course of their employment concerning such matters as manufacturing and assembly processes, which their employer would otherwise keep confidential. Clearly, the decisions below warrant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1980

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1283

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

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ARGUED JUNE 3, 1980—DECIDED JULY 21, 1980

Before SPRECHER and CUDAHY, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This review causes us to examine again the questions (1) what standard is to be applied to determine a confidential employee excluded under the National Labor Relations Act, 29

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

U.S.C. §§ 151 *et seq.*, and (2) whether the Board's finding that an employee was not a confidential employee is supported by substantial evidence on the record considered as a whole. See 29 U.S.C. § 160(e).

I

On July 17, 1978, the Board issued its order finding that the Company had violated section 8(a)(1) of the Act by discharging Mary M. Weatherman, the personal secrtary to its general manager and chief executive officer, for signing a petition calling for the reinstatement of an injured employee, and by interrogating another employee regarding the petition. The Board ordered the Company to cease and desist from discharging or taking other adverse action against any employee for engaging in protected, concerted activity, and from coercively interrogating employees concerning such activity. The Board further ordered the Company to reinstate Weatherman to her former job, or a substantially equivalent position, with back pay. 236 N.L.R.B. 1616 (1978).

On July 26, 1979, this court enforced the Board's order concerning the 8(a)(1) interrogation. However, we reversed and remanded the portion of the order dealing with the discharge of Weatherman and ordered the Board to use the legal standard outlined in our opinion to determine whether she was a confidential employee and therefore not covered by the Act. 603 F.2d 25 (7th Cir. 1979).

On October 10, 1979, the Board advised the parties that it had "decided to accept the remand from the Court of Appeals . . . , and all parties are hereby advised that they may file Statements of Position with the Board . . . ." The Company in its statement indicated that it believed that the record already con-

tained enough evidence to require the conclusion that Weatherman was not an employee under the standard established by this court. The Company added:

> However, if the Board believes that its prior conclusions and testimony hereinbelow does [*sic*] not mandate such a conclusion, the . . . [Company] believes that it is entitled to and that the Board should order a reopening of the proceedings to present further evidence regarding the issues on remand.

Record, Statement of Position of Hendricks County Rural Electric Membership Corporation, at 3.

Instead of taking further evidence, the Board reexamined the previous record and reaffirmed its prior conclusion that Weatherman was an employee under the Act. 247 N.L.R.B. No. 68 (1980).

The case is again before the court upon the Company's petition for review and the Board's cross-application for enforcement.

II

In *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), the Supreme Court held that Congress intended to exclude from the protection of the National Labor Relations Act all employees properly classified as "'managerial,' rather than just those in positions susceptible to conflicts of interest in labor relations." *Id.* at 274. To reach this holding, the Court first concluded that "confidential employees" were excluded from coverage under a "broad definition" not limited to those having a labor nexus. The Court said:

> In 1946 in *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those

> who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

416 U.S. at 284 n.12.

Immediately following in the text, the Court quoted with complete approval the Court of Appeals statement in *Bell Aerospace* as follows:

> "Surely Congress could not have supposed that, while confidential secretaries could not be organized, their bosses could be."

Id. at 284, quoting 475 F.2d 485, 491-92 (2d Cir. 1973).

Thus, although the *Bell Aerospace* holding applied to managerial employees, the statement in note 12 about confidential employees was not a mere dictum,[1] but was the basis, or at least part of the basis, upon which the holding itself was constructed. In *United States* v. *Bukowski*, 435 F.2d 1094, 1101 (7th Cir. 1970), we noted that a court of appeals could not depart, at its own choosing, from an analytical construct uniformly adhered to in decisions of the Supreme Court.

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[1] A dictum in a Supreme Court opinion may be brushed aside by the Supreme Court as dictum when the exact question is later presented, but it cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court. See 1B Moore's Federal Practice ¶ 0.402, at p. 112 & n.8.

Although the Board has accepted our prior decision in this case, in at least one subsequent case pending on review before us, *Malleable Iron Range Co.* v. *N.L.R.B.*, No. 79-1991, the Board strongly urges that our prior decision be overruled,[2] either on the basis that the Supreme Court was in error or misled as to the legislative history in footnote 12, or because of the Court's later opinion in *N.L.R.B.* v. *Yeshiva University*, 100 S.Ct. 856 (1980).

Not only are decisions of the Supreme Court of the United States and their clear implications absolutely binding on inferior federal courts,[3] but this is especially true of matters of legislative history and congressional purpose, *In re Continental Investment Corp.*, 586 F.2d 241, 248 (1st Cir. 1978), and of standards to be applied by an administrative agency or lower court. *Patterson* v. *Brown*, 393 F.2d 733, 736 (10th Cir. 1968). While we seriously doubt that the Supreme Court could be misled by counsel, a court of appeals is not at liberty to go behind an opinion or its clear implications on the ground that the Supreme Court "was not fully apprised by counsel in that case as to the legislative history . . . ." *United States* v. *Russell*, 461 F.2d 605, 608 (10th Cir. 1972).

We find nothing in the *Yeshiva* case which undermines or impliedly overrules anything said in *Bell*

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[2] However, this decision is the law of this circuit unless and until this court sitting in banc would determine otherwise or unless higher authority makes a contrary determination. *Powell* v. *United States*, 338 F.2d 556, 557 (7th Cir. 1964).

[3] The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const., Art. III, § 1.

Aerospace, which is cited with approval throughout the opinion. Therefore, we adhere to everything we said in *Hendricks County Rural Electric Membership Corp.* v. *N.L.R.B.*, 603 F.2d 25 (7th Cir. 1979), despite the Board's opinion that it is erroneous insofar as it relies upon note 12 of *Bell Aerospace*. Any changes in the substance of note 12 must come from higher authority.

III

In our prior opinion, we concluded that:

> The administrative law judge in this case limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations. We therefore find it necessary to remand the case for a determination [under the proper standard] . . . .

603 F.2d at 30 [footnote omitted].

The administrative law judge in his original opinion made it clear that the only standard he applied and the only one that the record evidence supported was the labor nexus standard:

> The record shows that Weatherman did not act "in a confidential capacity" to Dillion [the general manager] in any meaningful sense with respect to . . . [the Company's] labor relations policies . . . .
>
> * * * *
>
> Weatherman's "duties do not involve her in a confidential capacity with his responsibilities" with respect to labor policies. Accordingly, I conclude that Weatherman was not a confidential employee as the Board defines that term.

236 N.L.R.B. at 1619, 1620.

The record context in which the above statements were made by the administrative law judge was as follows. Early in the proceedings, the Company filed a written motion to dismiss on the ground that Weatherman was a confidential employee excluded under the Act. In an order dated July 22, 1977, an administrative law judge other than the one who eventually heard the evidence ruled that the motion would be reserved for the judge who would conduct the hearing. When the hearing began before the second judge, he noted the pendency of the motion and reserved his ruling. Near the beginning of the general manager's testimony intended to establish the confidential nature of Weatherman's job, the administrative law judge admonished the general manager to "stick to personnel files" and "to files pertaining to the employees." Transcript, Vol. II, at 101. A reading of the administrative record makes it obvious that the admonitions were observed inasmuch as there is clearly a conscious effort by all participants to restrict the evidence to that which pertains to labor or personnel matters.

If we had believed that the prior record was sufficient to support a finding under the *Bell Aerospace* standard, we would not have remanded the proceeding to the Board. Upon remand, the Board asked for statements of position, and the Company's position was that the proceedings should be reopened to present further evidence. When an erroneous standard for the admission of evidence is used, it follows almost mandatorily that a new record is needed, not only to add evidence in patchwork fashion but also possibly to rehear all the relevant evidence under the different admission standard.

The Board did not reopen the proceedings under the different standard, did not take any additional

evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before. We are asked to enforce an order which purports to apply the new standard to the old record but actually reapplies the old standard incorporating the labor nexus.[4]

The new broad standard was found to apply to the old record on the basis of "Dillon's statement that the . . . [Company] simply did not have secret papers or documents." Memo. op. at 5. Dillon's statement was that the Company had "nothing to hide from the *members*," Transcript, Vol. II, at 115 [emphasis supplied], and was supposedly supported by the Board's gratuitous conclusion that the Company "is a cooperative, and that all members *presumably* have access to [its] documents . . . ." Memo. op. at 4 n.8 [emphasis supplied]. That a company has no secrets from its members does not mean that it does not have matters or documents which are confidential insofar as its non-confidential employees are concerned, insofar as its competitors are concerned, insofar as regulatory agencies are concerned, and insofar as the public is concerned.

The petition to review is granted, and the application to enforce the order is denied.

ENFORCEMENT DENIED

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[4] The order is larded with labor nexus language: (1) "[A]mong the mail she did not see was that regarding union relations"; (2) "this correspondence apparently did not relate to labor relations or personnel matters"; (3) "[w]hile these meetings [of the Board of Directors] apparently occasionally involved personnel matters"; (4) "Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters."

CUDAHY, *Circuit Judge*, dissenting.

Unfortunately, the majority analysis here leads to a quite unjustifiable outcome. The result is that Mary Weatherman, personal secretary to the general manager of a rural electric membership corporation, has been lawfully fired for signing a petition asking for the reinstatement in his job of a friend and fellow worker who lost his arm in the course of his employment. Whatever may be our discomfiture at the Board's maneuvers on remand, only the gravest of reasons should lead us to sanction such a lamentable injustice.

While it might have been more politic for the Board to have reopened the hearing, the Company argues only one specific fact which it would have tried to establish during such a reopening: the Company's "involve[ment]" in "three (3) litigation cases" (presumably with a competitive investor-owned utility). There is slight likelihood that this "new fact" would materially change the basis for evaluating Weatherman's status as a "confidential secretary." The fact is that Weatherman's status was well explored and ventilated at the original hearing, and both we and the Board should be able to reach the requisite conclusion based on that record.

Hendricks County Rural Electric Membership Corp. v. *N.L.R.B.*, 603 F.2d 25 (7th Cir. 1979) ("*Hendricks I*") does indeed hold that a confidential *secretary* is excluded from the protection of the Labor Act (whether or not the confidences are labor relations-related). *Hendricks I* is , for better or for worse, the present law of this Circuit.[1] But there is abundant evidence in the record to support the Board's con-

[1] *But see Union Oil Company of California* v. *N.L.R.B.*, 607 F.2d 852 (9th Cir. 1979), which reaffirmed the traditional

clusion that Weatherman is not properly classified as a confidential secretary.

The Company's strongest (or at least most fully developed) argument to the contrary seems to be that Weatherman was responsible for processing employees' medical and disability insurance claims—admittedly confidential. But these were the confidences of *employees* she had to keep. It is simply ludicrous that one should be classified as part of "management" and lose the protections conferred on "labor" because one is entrusted with the confidences of one's fellow workers.

On a broader issue, the majority seems to assert that *Hendricks I* holds that "confidential *employees*" (not limited to secretaries and, of course, not limited by the labor relations' nexus) are unprotected under the Act. With the most profound deference, I find the holding of *Hendricks I* to be more narrowly directed specifically to *secretaries*. That case teaches that:

> The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act. 603 F.2d at 30.

This conclusion of our Court may be consonant with the dicta of *Bell Aerospace*,[2] which found, quoting the Second Circuit that, "surely Congress could not have

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Board standard under *The B. F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956), that the employee, to be excluded, must assist in a confidential capacity *with respect to labor relations*. *Accord*, *N.L.R.B.* v. *Allied Products Co., Richard Bros. Div.*, 548 F.2d 644 (6th Cir. 1977).

[2] *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

supposed that, while "confidential secretaries could not be organized, their bosses could be." 410 U.S. at 234 (quoting 475 F.2d at 491-92). If there is anything relating to confidential *employees* "upon which the holding [in *Bell Aerospace*] itself was constructed" (as the majority here perceives the issue), it is most evidently the relationship of confidential *secretaries* to their "managerial" bosses.

Everything else—beyond confidential secretaries—that relates to "confidential employees" is at the farther reaches of dictum, both in *Bell Aerospace* and in *Hendricks I*. Nothing about confidential employees generally is found in the holding in either case, nor is the status of such employees generally, a part of the essential framework from which the respective holdings emerge.

The majority admonishes us of the need for deference to the dicta of the Supreme Court. I have no quarrel with this as far as it goes, but the fact remains that the broad dicta in footnote 12 of *Bell Aerospace* about "confidential employees" are ambiguous[3] and essential to nothing. There are dicta and there are dicta, and the rule of *stare decisis* must give them effect appropriate to the circumstances under which they appear.[4] To build a whole new

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[3] Thus footnote 12 contains the following quotation from a House Report: *"Most of the people who would qualify as 'confidential' employees are executives and are excluded from the Act in any event.*

The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." Does this suggest that lower-level employees, not clerks or secretaries to executives, are rarely to be excluded?

[4] The Supreme Court long ago stated:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection

body of law about "confidential employees" uninvolved in labor relations, on the footnote dicta of *Bell Aerospace*—all in the name of deference to the Supreme Court—is quite simply totally unwarranted.[5] To paint with a broad brush about the purported exclusion of "confidential employees" (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most*, white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records—the list is endless.[6] I do not perceive at all

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with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

[5] In *Hendricks I* this court said in commenting on *Bell Aerospace*, "Nor do we think that the policies favoring the exclusion of all managerial employees from the Act necessarily dictate the exclusion of all confidential secretaries as well." 603 F.2d at 29.

[6] "Because most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively, the Board has narrowly construed the definition of confidential employee." *Union Oil Company of California* v. *N.L.R.B.*, *supra*, n.1 at 853.

that the dicta of *Bell Aerospace* point down this road. Nor does *Hendricks I* require such a journey.

With the utmost respect, I dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Sprecher
Judge Cudahy dissenting

NLRB JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 80-1283

Before
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge *

July 21, 1980

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review and cross-Application for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that enforcement of the order

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

of the National Labor Relations Board reviewed in this matter be, and the same is hereby, DENIED, with costs, in accordance with the opinion of this court entered this date.

A True Copy:

Teste:

/s/ Kathy Davis
Deputy Clerk of the U.S. Court of Appeals for the Seventh Circuit

APPENDIX C

FPT
D—6002
Danville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 25—CA—8921

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MARY M. WEATHERMAN, an Individual

SUPPLEMENTAL DECISION AND ORDER

On July 17, 1978, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Mary M. Weatherman, personal secretary to its general manager, for signing a petition calling for the reinstatement of an injured employee, and by interrogating another employee regarding the petition. The Board ordered the Respondent to cease and desist from discharging or taking other adverse action against any employee for engaging in protected, concerted activity, and from coercively interrogating employees concerning such activity. The Board further ordered the Respondent to reinstate Weatherman to her former job or, should that job no longer exist, to a substantially equivalent position, and to make her

[1] 236 NLRB No. 212.

whole for any loss of earnings she may have suffered by reason of her discharge.

Thereafter, the Respondent filed a petition for review of the Board's Order in the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement of its Order. On July 26, 1979, the court issued its decision,[2] which enforced the Board's Order concerning the 8(a)(1) interrogation, but reversed and remanded the aspect of the case dealing with the discharge of Weatherman to determine whether she was a confidential employee and therefore not covered by the Act under a different standard than that used by the Board.

On October 10, 1979, the Board advised the parties that it had decided to accept the remand, and that they might submit statements of position with respect to the issue raised by the remand. Thereafter, the General Counsel and the Respondent filed statements of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The issue on remand is narrowly limited to the alleged confidential status of Weatherman, as the court concluded that the Board's finding that she was discharged for participating in protected, concerted activity—signing a petition requesting the reinstatement of an injured employee—was supported by the evidence.

In our original decision, we found that Weatherman was not a confidential employee measured

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[2] *Hendricks County Rural Electric Membership Corporation* v. *N.L.R.B.*, 603 F.2d 25.

against our traditional standard that such employees are "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." [3] And the court agreed with our factual determination that, as personal secretary to Wallace Dillon, the Respondent's general manager, Weatherman did not act and assist him in a confidential capacity with respect to labor relations policies. The court also agreed with our finding that she did not work in a position equivalent to a personnel department employee. However, the court concluded, in light of its interpretation of the Supreme Court's opinion in *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*,[4] that *B. F. Goodrich* does not enunciate the correct legal standard for judging confidential employee status under the Act. Rather, the court held that the proper criteria to be applied is whether, by the nature of the employee's duties, the employee is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer. Accordingly, recognizing that "[t]he determination of 'confidential' status is . . . a question appropriately committed to Board discretion," the court remanded the case to us to decide under this standard if Weatherman was a confidential employee in terms of her "actual job responsibilities, authority, and relationship to management." [5] Accepting the court's criteria for resolving questions of confidential employee status

[3] *The B. F. Goodrich Company*, 115 NLRB 722, 724 (1956).

[4] 416 U.S. 267 (1974).

[5] 603 F.2d at 30.

as the law of this case only, we find that Weatherman was not a confidential employee.

When she was discharged in May 1977, Weatherman had been personal secretary to Dillon, the Respondent's general manager and top executive officer, for a little more than 4 years. In this capacity, she answered the telephone and opened mail addressed to the Respondent and Dillon, except for some mail which was removed before it reached her by Office Manager Donald Douglas and given to Dillon by him.[6] Although Weatherman typed all of Dillon's letters, this correspondence apparently did not relate to labor relations or personnel matters other than occasional letters referring to the dates of negotiating meetings with a union. Nor is there any evidence that it concerned confidential matters of any description. Weatherman generally did not place Dillon's telephone calls, nor did she keep a record of his appointments. Weatherman did share a partitioned office with Dillon, but no personnel records or confidential records of any type were kept there, excluding Dillon's testimony that he kept some papers concerning labor negotiations in a file behind his desk.[7] Weatherman did not attend meetings of Respondent's board of directors or other management meetings. However, she did type minutes of meetings of the board

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[6] Among the mail she did not see was that regarding union relations.

[7] As we pointed out in the initial decision herein, Weatherman had no duties concerning labor negotiations, nor was there any evidence that she was even aware of the existence of Dillon's file.

Weatherman did maintain some files respecting routine insurance claims filed by employees, which she was responsible for processing, for her own convenience.

of directors and the agenda for such meetings. While these meetings apparently occasionally involved personnel matters, there is no indication that such matters, or any other issues discussed during them, were confidential.[8] Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters. Finally, and most significantly, Dillon conceded at the hearing that the Respondent did not maintain secret or classified papers or documents.

As previously noted, the court of appeals affirmed not only our earlier finding that Weatherman did not work in a confidential capacity in respect to labor relations matters, but also that she was not the equivalent of a personnel department employee. Thus, for Weatherman to qualify as a confidential employee under the standard erected by the court, the record would have to disclose that she performed confidential duties in connection with nonlabor relations or personnel areas. Quite clearly, however, the evidence taken at the hearing contains no hint that Weatherman had any such responsibilities. That this was not merely an oversight in the course of litigation is confirmed by Dillon's statement that the Respondent simply did not have secret papers or documents.

Therefore, we reaffirm our conclusion, made in the original decision in this case, that the Respondent discharged Weatherman in violation of Section 8(a)(1) of the Act, and our remedial Order concerning that violation.[9]

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[8] We noted in our original decision that the Respondent is a cooperative, and that all members presumably have access to documents such as the minutes of board meetings.

[9] It is unnecessary to reaffirm our previous Order in regard to the Respondent's violation of Sec. 8(a)(1) by coercively

ORDER

It is hereby ordered that the Order issued by the Board in *Hendricks County Rural Electric Membership Corporation*, 236 NLRB No. 212 (1978), concerning the discharge of Mary M. Weatherman in violation of Section 8(a)(1) of the Act be, and it hereby is, reaffirmed.

Dated, Washington, D.C. January 22, 1980

JOHN H. FANNING, Chairman

JOHN A. PENELLO, Member

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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interrogating an employee, inasmuch as the court has already enforced that portion of our Order.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-2127

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A Petition for Review of an Order from the National Labor Relations Board

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ARGUED APRIL 13, 1979—DECIDED JULY 26, 1979

Before CUMMINGS, SPRECHER, *Circuit Judges*, and BONSAL, *Senior District Judge.**

SPRECHER, *Circuit Judge.* The employer, Hendricks County Rural Electric Memebership Corporation (REMC), appeals from a decision of the National Labor Relations Board finding that REMC engaged in unfair labor practices in violation of sec-

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* The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

tion 8(a)(1) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1). The principal issue presented by this appeal is whether the personal secretary to the general manager of REMC was an "employee" under section 2(3) of the Act. 29 U.S.C. § 152(3). We hold that the Board did not apply the appropriate legal standard for resolving this issue and remand for a factual application of the proper standard.

I

On May 9, 1977, the general manager of REMC, Wallace Dillon, discharged his personal secretary, Mary Weatherman. The General Counsel charged that Weatherman was discharged for engaging in concerted activities protected by section 7 of the National Labor Relations Act. The administrative law judge conducted a hearing and determined that Weatherman was an "employee" within the coverage of the Act, that she had engaged in protected concerted activity and that Dillon discharged her for that activity. The judge ordered REMC to reinstate Weatherman with back pay.

The facts surrounding Weatherman's discharge were carefully established by the administrative law judge. Lloyd Hadley, a close friend of Weatherman, was injured in the course of employment in February 1976, resulting in the loss of an arm. In March 1977, Hadley sought reinstatement with REMC. The Board of Directors notified Hadley in April that he would not be reinstated.

The first week in May, a petition requesting reconsideration of the decision not to reinstate Hadley was mailed to members of the Board. The petition was signed by 26 employees. Mary Weatherman signed the petition; she was the sixth employee to do so. On

Saturday, May 7, one of the directors called Dillon at home to advise him of the petition. Dillon drove to the director's home that day in order to see the petition.

At 10:00 a.m. on Monday, May 9, Dillon discharged Weatherman. At the hearing, Dillon testified that he discharged Weatherman for conduct unrelated to the Hadley petition. The administrative law judge conducted an extensive and careful evaluation of the evidence and concluded that Dillon's explanation of the discharge was "ludicrous."

We conclude, contrary to the argument of the employer, that the judge's decision that Mary Weatherman was discharged for signing the Hadley petition is fully supported by the evidence.[1] REMC argues additionally that the circulation of the Hadley petition was not conduct protected by the Act and that Mary Weatherman was not an employee protected by the Act. Although we conclude that the judge correctly characterized Mary Weatherman's conduct as "protected," we find it necessary to remand the decision for a new determination of her "employee" status.

II

REMC was guilty of an unfair labor practice in this case only if Mary Weatherman was discharged for engaging in "concerted activities for the purpose of . . . mutual aid or protection." Section 7, 29 U.S.C. § 157. The circulation of the petition among the employees was undoubtedly "concerted," but

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[1] The ALJ also found that REMC violated the Act by improperly interrogating another clerical employee about the petition. We find this conclusion is also supported by the evidence.

REMC disputes that it was circulated for the "purpose of mutual aid or protection."

The Board has only recently reiterated that circulation of a petition on behalf of a discharged employee is protected activity under section 7. *Youngstown Osteopathic Hospital Association*, 224 N.L.R.B. 574 (1976). Such activity is protected even if the discharge of the employee was lawful. *See, e.g., NLRB* v. *Pepsi-Cola Bottling Co.*, 449 F.2d 824, 830 n.5 (5th Cir. 1971).

Employee conduct should similarly be protected when the petition criticizes the employer's refusal to reinstate an injured employee. The administrative law judge specifically found the petition was motivated in part by the employees' desire to promote their own future well being should they be faced with a similar misfortune. Refusal to reinstate a former company employee seriously injured on the job is an issue about which the REMC employees "had a legitimate interest . . . in making known their views to management without being discharged for that interest." *NLRB* v. *Phoenix Mutual Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948).[3]

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[3] *Allied Chemical & Alkali Workers, Local No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), strongly relied on by the employer, simply does not undermine this conclusion. In *Pittsburgh Plate Glass*, the Court refused to find that reduction of the retired employees' pensions was a mandatory subject of bargaining. Mandatory bargaining extends only to the " 'terms and conditions of employment' of the employer's 'employees' . . . ." 404 U.S. at 164. The scope of activity protected under section 7 is obviously much broader, extending to concerted activity engaged in for the purposes of mutual aid and protection. Thus the fact that REMC may not have been under an obligation to bargain with the employees over Hadley's reinstatement in no way limits the employees' freedom to circulate a petition on his behalf.

III

Although the ALJ properly concluded that the circulation of the petition was protected activity, that protection can only extend to an individual who is an "employee" under the Act. Despite the breadth of the definition of "employee," [3] the Supreme Court has established that certain categories of employees are impliedly excluded from that definition. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974). REMC argues that individuals working in personnel departments or as confidential secretaries are impliedly excluded and that Weatherman fits in both categories.

In determining whether Mary Weatherman was a statutory "employee," the ALJ applied a well-established Board standard. The judge ruled that Mary Weatherman was only excluded from the Act if she "assist[ed] and act[ed] in a confidential capacity to persons who formulate, determine, and effectuate

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[3] The Act provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

§ 2(3), 29 U.S.C. § 152(3).

management policies in the field of labor relations." 236 N.L.R.B. No. 212 Appendix at 7, *quoting B. F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956). Examining the evidence carefully, the judge determined that Weatherman "did not act 'in a confidential capacity' to Dillon in any meaningful sense with respect to [employer's] labor relations policies. . . ." *Id.* The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous. The judge therefore concluded that Weatherman was a statutory "employee."

We do not believe that the judge erred factually by finding that Weatherman did not assist in a confidential capacity with respect to labor relations policies. We do conclude, however, that the use of the *B. F. Goodrich* standard was an error of law.

This Court has previously held that "confidential" secretaries are excluded from the Act. *Peerless, Inc.* v. *NLRB*, 484 F.2d 1108 (7th Cir. 1973). *See also NLRB* v. *Wheeling Electric Co.*, 444 F.2d 783 (4th Cir. 1971). The *B. F. Goodrich* standard does represent current Board law on the question of whether a secretary should be considered an excluded "confidential secretary." *See Willett Motor Coach Co.*, 227 N.L.R.B. 882 (1977); *Minneapolis Star and Tribune Co.*, 222 N.L.R.B. 342, 343 (1976); *California Inspection Rating Bureau*, 215 N.L.R.B. 780, 783 (1974). Nonetheless, we believe that standard was exposed to serious question by the 1974 decision of the Supreme Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

In *Bell Aerospace*, the Supreme Court confronted the issue of whether buyers in an employer's purchasing department were statutory employees or were ex-

cludable as managerial employees. The Board argued that even though the buyers were managerial, they were covered by the Act since their jobs were unrelated to the "formulation and implementation of labor relations policies." 416 U.S. at 272. The Supreme Court disagreed, holding that all managerial employees were excluded from the Act without regard to any employment nexus to labor relations policies.

The Supreme Court was not presented with the issue of whether all secretaries acting in confidential capacity are also excluded from the Act without regard to labor relations nexus. Nor do we think that the policies favoring the exclusion of all managerial employees from the Act necessarily dictate the exclusion of all confidential secretaries as well. Nonetheless, the Supreme Court interpretation in *Bell Aerospace* of the 1947 amendment to the National Labor Relations Act and its legislative history requires the conclusion that all confidential secretaries are excluded.

In 1947, Congress passed the Taft-Hartley Act, amending the National Labor Relations Act to exclude "supervisors" from the Act.[4] The House bill, H.R. 3020, 80th Cong., 1st Sess. (1947), excluded,

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[4] The Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§ 2(11), 29 U.S.C. § 152(11).

through its definition of supervisor, those employees "employed in labor relations, personnel, [or] employment . . . matters" as well as those "who by the nature of [their] duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of employer." 416 U.S. at 279-80 n.9. The Senate Bill, on the other hand, did not enumerate these two categories of employees for exclusion.

Although the Senate version of the Bill was eventually enacted, the Conference Committee Report emphasized that "persons working in labor relations, personnel and employment departments" and "confidential secretaries" were considered excluded. A specific provision "was not thought necessary . . . since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the Act." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35-36 (1947). Relying on this legislative history, the Supreme Court in *Bell Aerospace* concluded that confidential employees, including confidential secretaries, were persons "who both the House and the Senate believed were plainly outside the Act." 416 U.S. at 283.

Proceeding from the interpretation that confidential secretaries were excluded from the Act, the Court reasoned that managerial employees should also be impliedly excluded. The Court concluded: "The Court of Appeals in the instant case put the issue well: '. . . Surely Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be.' " *Id.* at 284, quoting 475 F.2d at 491-92.

The Court thus clearly read the 1947 history as indicating a Congressional intention to exclude con-

fidential secretaries. The Court's opinion and various segments of the legislative history further clarify that "confidential" status was not to be defined by reference to labor relations. The Court stated, "[t]he discussion of 'confidential employees' in both the House and Conference Committee Reports . . . unmistakably refers to that term as defined in the House bill, which was not limited just to those [employees] in 'labor relations.'" 416 U.S. at 284 n.12. The House Report, in no uncertain terms, expressed an intention that "confidential" status not be restricted by a labor nexus.

> [P]rotecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the board . . . . The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information.

H.R. Rep. No. 245, 80th Cong., 1st Sess., as cited in *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 606 (8th Cir. 1971).

The conference report, as excerpted above, states that no specific exception was necessary since the Board already excluded such individuals. In fact, the Board has historically excluded only those confidential secretaries working for individuals in the field of labor relations. *See, e.g., Consolidated Vultee Aircraft Corporation*, 54 N.L.R.B. 103, 113 (1943). Nonetheless, the Supreme Court found that although "Congress may have misconstrued . . . Board practice," it "clearly thought that the Act did not cover

'confidential employees' even under a broad definition of that term.' " 416 U.S. at 268 n.12.[5]

The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act. The administrative law judge in this case limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations. We therefore find it necessary to remand the case[6] for a determination of whether "by the nature of [her] duties" she was "given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." H.R. 3020 § 2 (12) (C), 80th Cong., 1st Sess. (1947). See also 416 U.S. at 284 n.12. The determination of "confidential" status is of course a question appropriately committed to Board discretion. As the Supreme Court stated in *Bell Aerospace*, "the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are 'managerial' [or confidential] must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." 416 U.S. at 290 n.19. The order is reversed and remanded for proceedings consistent with this opinion.

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[5] See also note 10 of the Second Circuit opinion in *Bell*. 475 F.2d 485, 492.

[6] As to the necessity for remand in a case such as this, *see Bell Aerospace*, 416 U.S. at 290; *FTC* v. *Sperry & Hutcherson Co.*, 405 U.S. 233, 249 (1972).

BONSAL, *District Judge*, dissenting.

I would affirm. The record satisfies me that Mary Weatherman was not a "confidential secretary" and was covered by the Act. The finding of the administrative judge that she was discharged for engaging in protected concerted activity, viz., the circulation of the petition asking reconsideration by the Board of Directors of its decision not to reinstate Hadley, was supported by substantial evidence.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION *and* MARY M. WEATHERMAN

Case 25-CA-8921

July 17, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On April 4, 1978, Administrative Law Judge Bernard Reis issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the Decision of the Administrative Law Judge.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] The Respondent has also filed a motion entitled "Motion to Strike General Counsel's Brief to the Board." In its motion, the Respondent characterizes the General Counsel's brief as an answering brief and asserts that it does not comply with Sec. 102.46(d)(1) and (2) of the Board's Rules and Regulations, Series 8, as amended, which govern the filing of answering briefs. The General Counsel's brief, however, is clearly denominated as a brief in support of the Decision of the Administrative Law Judge. We note that Sec. 102.46(a) of the Rules and Regulations sets forth the provisions regarding the filing of such briefs and, upon careful examination, we have determined that the General Counsel's brief complies with the pertinent portion of that section in all respects. Accordingly, the Respondent's motion to strike is denied.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify his remedy,[2] and to adopt his recommended Order.

In agreement with the Administrative Law Judge, we find that the Respondent's discharge of Mary Weatherman in violation of Section 8(a)(1) of the Act necessitates an order requiring the Respondent to cease and desist from infringing in any other manner upon the rights guaranteed employees by Section 7 of the Act. In our view, the Respondent's action in discharging Weatherman for engaging in protected concerted activity strikes at the heart of the rights intended to be protected by the Act. See *N.L.R.B.* v. *Entwistle Mfg. Co.*,[3] and *Electrical Fittings Corporation, a subsidiary of ITE Imperial Corporation.*[4] We specifically note the Respondent's rapid retaliation shortly after being made aware of Weatherman's participation in protected activity and the blatantly pretextual reasons given for her discharge. We further note that the Respondent coercively interrogated Martha Sellers who, like Weatherman, was one of the Respondent's 10 unrepresented clerical employees,[5] regarding the identity of the employee chiefly responsible for the circulation of the petition herein. Accordingly, we view the above-stated facts as establishing the Respondent's intention to thwart the basic

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[2] *See Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[3] 120 F.2d 532, 536 (C.A. 4, 1941).

[4] 216 NLRB 1076 (1975).

[5] The Respondent's entire employee complement is comprised of approximately 35 employees.

purposes of the Act, and therefore conclude that a broad order is justified under the circumstances present in this case.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hendricks County Rural Electric Membership Corporation, Danville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.[6]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all parties had the opportunity to present their evidence, it has been decided that we violated the law and we have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions

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[6] The Administrative Law Judge inadvertently failed to conform the notice with his recommended Order. We shall correct the notice accordingly.

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any and all of these things.

WE WILL NOT discharge or otherwise discipline any employee for engaging in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT coercively interrogate employees about such activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer to Mary M. Weatherman immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent one, without prejudice to her seniority or other rights, privileges, or working conditions.

WE WILL make Mary M. Weatherman whole, plus interest, for any loss of pay or other benefits suffered by her as a result of her discharge.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

DECISION

BERNARD RIES, Administrative Law Judge: This matter was heard on December 22, 1977, and January 9, 1978, in Indianapolis, Indiana. The complaint,

denied in all material respects, alleges that the Respondent, Hendricks County Rural Electric Membership Corporation, violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Mary M. Weatherman on May 9, 1977, and by coercively interrogating another employee 2 weeks thereafter. I find the complaint supported by the evidence.

The parties have submitted briefs. On the basis of the demeanor of the witnesses, the entire record,[1] and the arguments advanced on brief, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent is engaged, at Danville, Indiana, in the business of supplying electricity and related services. During the year preceding issuance of the complaint, it purchased and received in Indiana goods valued in excess of $50,000 from other States, and sold electricity at a value in excess of $500,000. Upon the factual concessions made in Respondent's answer to the complaint, I find that Respondent is an employer engaged in commerce within the meaning of the Act.

II. THE RELEVANT EVIDENCE

Respondent is a rural electric membership cooperative. While fundamental policies are established by a 10-man board of directors, its top executive officer is General Manager Wallace E. Dillon, who has occupied that position for 14 years. The basic issue presented is whether, on May 9, 1977, Dillon discharged

[1] Errors in the transcript have been noted and corrected.

Mary Weatherman, his secretary, because of her participation in concerted activities protected by Section 7 of the statute. At the time of her discharge, Weatherman had been employed by Respondent for more than 9 years, and had served as Dillon's secretary for 4 years.

Lloyd Hadley, a longtime employee of Respondent and a close friend of Weatherman's, was injured in the course of employment in February 1976, suffering the loss of an arm. Hadley recovered sufficiently so that, in March 1977, he sought reinstatement with Respondent. In April, the board of directors notified Hadley that he would not be considered for reinstatement to active employment.

Toward the end of April, a petition, addressed to the board of directors, circulated among Respondent's employees. The petition praised Hadley's outstanding past service to Respondent, stressed his surprising recuperation, spoke of his intense desire to return to work, and asked that the board reconsider its decision. The petition was signed by 26 employees, including both "outside" workers and office clerical employees.[2] Mary Weatherman signed the petition; she was the sixth employee to do so.

Copies of the petition were mailed to members of the board in the first week of May. At 3 p.m. on Saturday, May 7, Director Truax called General Manager Dillon at home, ascertained that Dillon had not seen the petition, and asked Dillon to come to Truax's house so that he might see Truax's copy. Dillon drove some 7 miles to do so.

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[2] The outside employees, about 25 in number, are represented by the International Brotherhood of Electrical Workers; the 10 clericals are not represented by a labor organization.

At 10 a.m. on Monday, May 9, Dillon discharged Weatherman. The reason given her for the termination and, as Dillon testified at the hearing, the only reason for the action, was that she had lied to him in the preceding week. The date of the incident relied on by Dillon as the sole reason for discharge is in dispute: Dillon testified that it occurred on Friday, May 6, but Weatherman said it was Thursday, May 5. The basic facts of the incident, however, are not in controversy.

In March, Dillon had received from Respondent's group retirement administrator two forms relating to Lloyd Hadley's disability claim, one a form to be filled out by Hadley, and the other to be completed by Hadley's physician. The forms were needed to establish Hadley's disability so that a waiver of premiums for his life insurance could be obtained. As of the first week in May, Hadley's form was virtually completed, except, apparently, for Hadley's signature, but Dillon was awaiting return of the other document by the physician. Dillon intended to return both forms to the retirement administrator at the same time.

On May 5 or 6, Dillon, who was in his office perusing a file folder which contained xeroxed copies of the Hadley form, asked Weatherman about her personal knowledge of Hadley's intentions ("if he was going to draw his long-term disability or what he was going to do about it"), and also inquired about the location of the original forms. Weatherman stated that the doctor had not returned his. Looking at the copy of Hadley's form, and noting the absence of any notation that the original had been mailed out, Weatherman asked Dillon if the original was in the file. When he said it was not, she said she must have

mailed it to a firm named J. F. Molloy and Associates, which administers Respondent's group medical insurance program.[3]

A while later, Dillon again inquired about the form, and Weatherman repeated that she must have sent it to Molloy. Several minutes later, Dillon inquired once more, received the same answer, and then asked her to call Molloy and tell them, if they had the form, to forward it to Respondent's broker. When Weatherman called and was told by Molloy that it had not received the form, she looked in her file on Hadley, which she thought Dillon had already done, and found the missing document.[4] She informed Dillon of the discovery and asked if he wanted it mailed to the broker; he said not to send it until the doctor's form had been received, at which time both could be sent together.[5]

On Monday, May 9, at or about 10 a.m., the first working day after he saw the petition with Weatherman's name on it, Dillon called Weatherman into his office and told her that because she had "fibbed" to him the previous week about having mailed out the form, she was discharged.

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[3] Weatherman testified that it was the practice to mail any forms with the designation "Bankers Life Company" on them (as the Hadley form had) to Molloy.

[4] Weatherman had not checked her files before because she had assumed that the file Dillon was looking at was her own. The record shows that Dillon maintained his own separate file on the Hadley case, and I assume that was in fact the file which Weatherman saw open before him.

[5] The foregoing findings are based on the testimony of Weatherman, a much more impressive witness than Dillon There is, however, not a great deal of conflict between their accounts.

At the threshold, I find that the disputed incident occurred on Thursday, May 5, rather than the following day. Weatherman testified that, after the solution of the missing form mystery, Dillon told her to tell Hadley to come in to see him the next time Hadley visited the office. The next day, May 6, Hadley dropped in, Weatherman conveyed the message, and Hadley apparently met with Dillon. Hadley, a credible witness, corroborated Weatherman's testimony.[6]

I further find that the sole reason for the discharge of Weatherman was the fact that she had signed the Hadley petition.

Dillon's claim that he discharged her for "fibbing" to him is preposterous. The facts surrounding the temporarily missing document, discussed above, make it plain that any sane person (which Dillon is) would have regarded Weatherman's failure to immediately locate the form as a simple error, not a deception. Asked at the hearing if he could conceive of any reason why Weatherman would want to lie about having sent the form to Molloy, Dillon could think of none. Dillon, who testified that he delayed firing Weatherman in order to spend the weekend considering the matter, unquestionably would have recognized, in so deliberating, that any "lie" about having sent the letter to Molloy would have been pointless, since, even if Weatherman had done so, it would have been the simplest matter to retrieve the form from Molloy, a

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[6] Respondent introduced, for purposes of impeachment, a note written by Weatherman on May 18 to a former business associate in which she discussed the circumstances of her discharge. In doing so, she stated in the first paragraph that Dillon had asked about the status of the form on "May 6th." In the second paragraph, however, Weatherman wrote, "This was on Thursday." The reference to May 6 was, as Weatherman testified, an obvious inadvertence.

local concern. In addition, since Respondent had, to Dillon's knowledge, retained a copy of the form, there was no possibility of loss.

I find too ludicrous for serious consideration the claim that Dillon, who purportedly debated the potential discharge at some length, finally concluded that this minor mistake should be characterized as a lie and the basis for discharging an employee with 9 years' tenure. The incredulity expressed by Weatherman in her final conversation with Dillon was apt: "Are you telling me that you are terminating me because of an insurance form that I said I had mailed and it hadn't been mailed but we didn't want it mailed anyway, and he said that's right."

Further support for the conclusion of pretext is found in Dillon's wholly inept attempt to explain the delay in firing Weatherman for the reason asserted. Since, had the incident actually occurred on Thursday, he could not have easily justified more than a 1-day delay, until Friday, for the asserted purpose of thinking the matter over, he shifted the date of the occurence to Friday, thus hoping to lend some plausibility to an otherwise surprising discharge at the beginning of the week.

But he did more. He added, as a reason for waiting until Monday, instead of having immediately punished Weatherman for the offense which allegedly occurred on Friday, that he had held back because he did not want to discharge her until he received the form from Hadley's doctor: "Over the weekend I had determined that when the form came in and I had it in my hand, then I was going to terminate her." Upon inquiry, he could furnish no explanation for this strange precondition. What he appeared to be saying was that it was critically important that Weatherman, and only Weatherman, be there to per-

sonally open the letter containing the doctor's form, or to write a letter asking for it, and yet he had no explanation why her presence was indispensable to such mundane tasks. There were nine other clericals in the office and Dillon was in good health; any of them, I feel certain, was up to the job of opening an envelope. This nonsensical explanation for delay further depreciates the value of Dillon's perilously frail reason for discharge.

I conclude, therefore, with no reservations, that the appearance of Weatherman's signature on the petition, seen by Dillon on Saturday, caused him to reach back to the preceding Thursday and magnify into a dischargeable offense the trivial incident which had occurred on that day.[7] Respondent, however, ad-

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[7] I have taken into account Weatherman's open testimony that, on Thursday, she had the "impression" that Dillon thought she "had intentionally held the form back for some reason," although "he didn't say that." How much of that impression is hindsight unconsciously influenced by the reason given to her for the discharge and by Dillon's testimony is unascertainable. But even if it were true that Dillon evinced such an attitude, I find, in view of the delay, the fact that no rational mind, after considering the matter, could have concluded that she had been intentionally lying, the deception about when the incident occurred, and the fatuous story about retaining Weatherman until the doctor's letter was received, that the precipitating cause for discharge of this 9-year employee was Dillon's interim awareness of the petition.

That Dillon would have been particularly upset about Weatherman's participation (and that of other employees) in the petition sent to the directors is, I note, demonstrated by her uncontradicted testimony that, in February 1977, when she had contacted some directors about certain innocuous travel plans, Dillon angrily warned her, "I never again want you to call the directors."

In reaching my conclusion about Dillon's motive, I have considered the testimony of Assistant Manager Wayne Spen-

vances two legal defenses to the claimed violation here. The first is that Weatherman was confidential employee and therefore not protected by the Act.

In *Wheeling Electric Company*, 182 NLRB 218, 220-221 (1970), the Board held that confidential employees are entitled to the safeguards afforded by Section 8(a)(1). That decision was reversed on review, 444 F.2d 783 (C.A. 4, 1971). Subsequently, although without reference to *Wheeling*, the Board approved the conclusion of a Trial Examiner that "there can be no inference that [confidential employees] are not accorded the protection of the Act from unfair labor practices." *Peerless of America, Incorporated*, 198 NLRB 982, 987 (1972). Finding persuasive the Fourth Circuit's *Wheeling* opinion, the Seventh Circuit denied enforcement of *Peerless* on this point. 484 F.2d 1108, 1112 (1973).

It would appear that *Wheeling* and *Peerless* represent the Board's last say on the issue, and I am therefore bound to reject the defense. In any event, my evaluation of the evidence leads me to conclude that the defense has no sufficient factual predicate.

The Board defines confidential employees as "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *The B. F. Goodrich Company*, 115 NLRB 722, 724 (1956). There are thus two essential elements. The first is that the employee assist "in a confidential capacity." The second is that the person assisted ful-

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cer, who testified that Dillon displayed no "irritation" when he told Spencer, around May 10, about the petition, and that Dillon later said to Spencer that Weatherman had been terminated because she "storied to him about a letter." Spencer's testimony does not alter some rather plain facts.

fill all three roles *vis-a-vis* labor relations policies; in *B. F. Goodrich*, the Board stressed the word "and" between "determine" and "effectuate," and in *Weyerhaeuser Company*, 173 NLRB 1170, 1172 (1968), it reiterated that "the quoted considerations are to be assessed in the conjunctive." [8]

The record shows that Weatherman did not act "in a confidential capacity" to Dillon any meaningful sense with respect to Respondent's labor relations policies; it discloses, in fact, that the range of her duties was deliberately restricted so as to preclude her from doing so. By and large, Weatherman's duties related to the routine operations of Respondent's business. While she opened mail addressed to Respondent and Dillon, she credibly testified that she never saw copies of correspondence from Respondent's lawyers to the union which represented the outside workers, because Office Manager Donald Douglas removed all such mail before it reached her desk and gave it directly to Dillon. Weatherman further credibly testified that Dillon normally placed his own telephone calls, and that she did not keep a list of Dillon's appointments.[9]

There were no personnel files maintained in the partitioned office shared by Weatherman and Dillon. As she testified, and Dillon substantially agreed, the only files she maintained were for those employees who made insurance claims; Weatherman kept these files for her own convenience, to use in processing the claims, and they were apparently destroyed after a short period of time.

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[8] This approach, however, seems vulnerable to attack. It is hard to conceive that, if the assisted person only "formulates" policy, his confidential assistant will not be excluded.

[9] I do not believe Dillon's contrary testimony.

While Weatherman typed Dillon's letters, there is no evidence that any of them related to union or personnel matters. She said that the only union-related letters typed by her were notices to Respondent's counsel about the dates of the negotiating meetings held every few years. She testified without contradiction that she typed no intramural memoranda regarding labor policies, did not attend board meetings or internal management meetings, was not involved with negotiations, grievances, discipline, or rewards, and had nothing to do with payroll matters.[10]

Despite the fact that Weatherman worked for Dillon for 4 years, the only documents typed by her which Respondent introduced in evidence were minutes of meetings of the board of directors.[11] Those introduced contain references to the Hadley request for reinstatement, and I assume that other sets of minutes refer occasionally to personnel matters. However, these documents can hardly be considered confidential, since Respondent is a cooperative and presumably all members are entitled to see the minutes.[12] Moreover, the Board has held that occasional typing of material relating to personnel problems does not render an employee confidential in nature. *ITT Grin-*

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[10] Dillon testified that interviews with prospective employees "usually" are held in a conference room, and that, when "labor relations problems with the clerical people or with the outside people" arise, they are first handled by Spencer and Douglas, and then, if not resolved, "usually" considered by Dillon in a joint discussion in the conference room, where there is space for the participants.

[11] Weatherman typed these from drafts prepared by Respondent's counsel.

[12] Dillon agreed that Respondent has no "secret" papers.

nell Corporation, 212 NLRB 734 (1974); *Weyerhaeuser Company, supra.*

It is questionable whether Dillon falls into the category of "persons who formulate, determine, and effectuate" labor policies in the conjunctive sense intended by the Board in *B. F. Goodrich, supra.* While Spencer testified that Dillon was "responsible . . . for formulating management policies with regard to labor relations," Dillon himself testified that the board of directors in fact performed that function. While Spencer testified that determinations of "management policy concerning interpretations of the labor contract with the IBEW" were made by Spencer with "the approval" of Dillon, the latter testified that he had "no" function in "interpreting the labor contracts and labor relations among employees." Dillon further said that he participated "very little" in contract negotiations, although he would apparently be present at the meetings. It seems clear from Dillon's testimony that he plays a most passive role in labor and employee relations matters, and this obviously reflects on the assertedly "confidential" character of Weatherman's employment.

Dillon did, however, collect some papers relating to labor contract negotiations, including copies of the positions developed by Respondent's negotiating committee [13] and notes taken by him at negotiations, in "a file behind [his] desk." Weatherman has no duties with respect to these matters, and there is no evidence that she was even aware of the existence of the file.[14] But assuming that fact, the Board has never

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[13] These are handed to him directly by Respondent's counsel.

[14] Dillon also "kept . . . at my desk" reports by an executive committee of the board appointed to consider Hadley's request for reinstatement. These also were handed to him by Respondent's counsel.

held that potential physical access to confidential matters is sufficient to characterize an employee as a confidential.

Early on, the Board noted that the exception applied to employees "who *in the normal performance of their duties* may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters." *The Hoover Company*, 55 NLRB 1321, 1323 (1944), emphasis supplied. In *The Santa Fe Trail Transportation Company*, 119 NLRB 1302, 1304 (1958), the Board refused to exclude the "head file clerk who has charge of files in the general manager's office," and in *Hotel Employers Association of San Francisco*, 159 NLRB 143, 150 (1966), the Board stated, "Mere access to personnel records does not qualify an employee as a confidential employee." Following this line of cases, it was held in *Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation*, 196 NLRB 1036, 1041 (1972), that an employee who had "access to [the project manager's] files, including those relating to personnel matters and such grievances as might arise," did not thereby act in a "confidential capacity" to him. Accord: *California Inspection Rating Bureau*, 215 NLRB 780 (1974). The possibility that Weatherman may have been in a position to rifle Dillon's desk no more makes her a confidential employee than does that same possibility convert the other nine clericals into confidentials; the fact is that she did not work with these concealed papers "in the normal performance of [her] duties."

Thus, even if Dillon were found to be the sort of conjunctive manager contemplated in *B. F. Goodrich*, it is clear that, as in *John Sexton & Co., Division of*

Beatrice Foods Co., 224 NLRB 1341 (1976), Weatherman's "duties do not involve her in a confidential capacity with his responsibilities" with respect to labor policies. Accordingly, I conclude that Weatherman was not a confidential employee as the Board defines that term.

Respondent's final contention is that Weatherman's signing of the petition did not constitute Section 7 activity because the petition concerned the plight of a former employee.[15]

Respondent relies on *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, 404 U.S. 157 (1971), which held that changes in the benefits of retired employees are not a mandatory subject of bargaining. The question of whether retired employees are statutory "employees" represented by a union for purposes of Section 8(d) is, however, quite a different question from whether a petition circulated by active employees for the purpose of seeking the reemployment of a former colleague constitutes "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7.[16]

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[15] Although the record is unclear on this matter, and Hadley himself could not say exactly what his status was, I assume here that, as of May 1977, he had been officially removed from employment with Respondent. Dillon said Hadley "stop[ped] being an employee" in "approximately" April 1977.

[16] Indeed, in *Pittsburgh Plate Glass*, the Court did not deny the applicability of the statute to "applicants for employment" and "persons who have quit or whose employers have gone out of business"; it distinguished those cases because they involved individuals "who, unlike the pensioners here, were members of the active work force available for hire

In any event, the short answer to Respondent's argument, as General Counsel points out, is that the Board has only recently held that circulation of a petition seeking the reinstatement of a discharged employee is a protected concerted activity. *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574 (1976).

I might also note the longstanding application of Section 7 to activities engaged in on behalf of non-employees, *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F.2d 503 (C.A. 2, 1942), and employees in other bargaining units, *Signal Oil and Gas Company*, 160 NLRB 644 (1966), enfd. 390 F.2d 338 (C.A. 9, 1968). These cases turn on the potential for reciprocal support which the acting employees might bank on in the future. In the present case, there is the added factor that, in circulating the petition, the signers clearly had in mind not only Hadley's welfare but also their own future well being. The petition states, in part:

> It seems that the problem is no one is willing to speak up or defend what is right if it might mean jeopardizing one's own self. As long as you take care of number one, yourself, no one else matters. Well, other people do matter and Lloyd Hadley matters, to us and to many other people.
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> * * * *
>
> You hear much talk today about employees not wanting to give a full day's work for a full day's

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and at least in that sense could be identified as employees" (unlike the case before the Court, involving "individual[s] who [have] ceased work without expectation of further employment"). 404 U.S. at 168. But "further employment" for Hadley was precisely what the petition sought.

> pay, and not having any pride in their job; well, you just lost one that did. But what about the other side. Doesn't a company owe any kind of loyalty to an employee? When an employee gives you 15 years of work, doing more than his share, and then almost gives you his life, is this what he gets in return?

It seems plain that the Hadley case touched a collective nerve which inspired a group of ordinary citizens, who might not be individually "willing to speak up" because "it might mean jeopardizing one's own self," to boldly band together, finding needed strength in unity. And, in so uniting, they sought to arouse in Respondent a "kind of loyalty" which might not only serve Hadley's interest but also their own as well. By sparking some compassion for Hadley, the employees might have focused Respondent's attention on the need for greater generosity toward the work force as a whole. By taking up the cudgels for Hadley, the employees might have moved Respondent to appraise future disability retirement actions pertaining to themselves more conscientiously and deliberately. And, by obtaining Hadley's return to work and his successful performance thereof, the employees might have paved the way for their own return to work in similar circumstances.

In addition, it is reasonable to say that just as an expressed desire to have members of another racial group working alongside present employees literally relates to terms or conditions of employment, *N.L.R.B.* v. *Tanner Motor Livery, Ltd.*, 349 F.2d 1, 4 (C.A. 9, 1969), so too did this expression of a wish to have Hadley returned to the employment roster.

On the foregoing considerations, I conclude that the discharge of Weatherman on May 9, 1977, violated Section 8(a)(1) of the Act.

The complaint contains a separate allegation of unlawful interrogation. Martha Sellers, a bookkeeper, credibly testified that, on May 24, she went to Dillon "to talk to him about some problems in the office and about some feelings I had." She expressed the unease of the employees, in view of Weatherman's discharge, about having signed the petition. Dillon said the petition "had nothing to do with it" and that, if she did her job, she need not worry.[17] Sellers persistently alluded to the petition as the cause of Weatherman's discharge, and Dillon told her not to "mess with management." After some further discussion of other matters, Dillon asked "who passed the letter around and I said we weren't supposed to be talking about the letter."

Dillon did not testify about this conversation, and I credit Sellers. I further conclude that the question about "who passed the letter around" had a reasonable tendency to coerce Sellers in the exercise of such protected activity. It is true that Sellers initiated the conversation. It is also true that Dillon had attempted to assuage her concern that Weatherman's signature on the petition had caused her discharge. But Sellers had begun the talk by expressing her fear, and, by pressing the issue, had indicated to Dillon her continued uncertainty. When, after the discussion had passed on to other subjects, Dillon reverted to the matter which concerned Sellers and openly questioned her about the identify of the chief provocateur, I cannot imagine that such probing would not reasonably have led Sellers to infer an inordinate, and threatening, management interest in the matter. Her evasive answer so indicates.

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[17] Weatherman had filed her charge with the Board on the same day she was terminated.

I therefore find that Respondent coercively interrogated Sellers by the question Dillon posed on May 24, 1977.

CONCLUSIONS OF LAW

1. Hendricks County Rural Electric Membership Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Mary M. Weatherman on May 9, 1977, Respondent violated Section 8(a)(1) of the Act.

3. By coercively interrogating Martha Sellers on May 24, 1977, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act by certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

I shall recommend that Respondent be required to offer reinstatement to Mary M. Weatherman, and to make her whole for any loss of earnings she may have suffered by reason of her unlawful discharge, by payment to her of a sum of money equal to that which she normally would have earned from the date of discharge to the date of a valid offer of reinstatement, less her net earnings during that period, to be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). I shall

also recommend that Respondent post an appropriate notice.

Upon the foregoing findings of fact and conclusions of law, the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:

ORDER [18]

The Respondent, Hendricks County Rural Electric Membership Corporation, Danville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or taking other adverse action against any employee in circumstances constituting interference with, restraint of, or coercion of employees in the exercise of their rights under Section 7 of the Act.

(b) Coercively interrogating employees about their protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Offer to Mary M. Weatherman immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent job, and

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[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

make her whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the backpay due under the terms of this recommended Order.

(c) Post at its place of business in Danville, Indiana, copies of the attached notice marked "Appendix." [19] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX F

Unpublished Order Not to Be Cited
Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

ARGUED: JUNE 3, 1980

July 21, 1980

Before
HON. ROBERT A. SPRECHER, Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. WILLIAM J. CAMPBELL, Senior District Judge *

No. 79-1991

MALLEABLE IRON RANGE COMPANY, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A Petition for Review of an Order from the
National Labor Relations Board

ORDER

This review requires us once more to consider whether the Board applied the proper standard in determining confidential employees excluded from a

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

bargaining unit under the National Labor Relations Act. 29 U.S.C. §§ 151 *et seq.*

The Company employs approximately 450 employees at its Beaver Dam, Wisconsin facility. Of these, about 265 employees in the factory are represented by Local 1953, International Brotherhood of Electrical Workers. In addition, approximately 100 employees in the foundry are represented by Local 34, International Molders and Allied Workers Union.

Local 39, Office and Professional Employees International Union, petitioned on December 18, 1978, to represent a residual unit of office clericals, technical and professional employees excluding managerial and confidential employees, guards, and supervisors and other union-represented employees. An evidentiary hearing was held from time to time between January 8 and 25, 1979, before a hearing officer, during which hearing the Company contested the inclusion of 35 employees within the bargaining unit proposed. The parties stipulated that 52 employees were excluded as managerial, supervisory or confidential employees. On February 27, 1979, the Regional Director found the Union's requested unit to be appropriate. The Company's Request for Review was denied by the Board. On March 28, the representation election was held and the vote was 40 for the Union and 15 against. The Union was certified on April 5, 1979.

The Company refused to bargain and on May 17 the Regional Director issued an unfair labor practice complaint. The Company answered on the grounds that the Regional Director's conclusions were erroneous as to the proper scope of the unit and as to the inclusion in the unit of employees who should properly have been excluded.

On July 26, 1979, we issued our opinion in *Hendricks County Rural Electric Membership Corp.* v.

N.L.R.B., 603 F.2d 25 (7th Cir. 1979), in which we concluded that *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267, 284 n.12 (1974), required us to hold that all confidential employees, and not only those in labor relations, were excluded from the protection of the Act.

On August 21, 1979, the Board granted the General Counsel's motion for summary judgment and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the certified bargaining representation [*sic*] of its residual employees. The Company petitioned for review and the Board has cross-applied for enforcement of its order.

The Company has contended that at least 18 of its employees should be excluded from the unit because they have access to confidential information and are therefore confidential employees. The Board conceded that in determining the employees included in the unit it applied "the Board's traditional 'labor nexus' test" and not the test or standard established in *Hendricks* case. See Brief of Board at 32.

Although the Board enjoys broad discretion in designating bargaining units and also in determining "employees" protected by the Act, the bargaining unit designation must not "[overstep] the law," see *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, 491 (1947), and the Board's determination that specified persons are "employees" under the Act is to be accepted only if it has "a reasonable basis in law." *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). If the Board oversteps the law in either respect, its designation or determination cannot be accepted. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166, 171-72

(1971). Where review of the Board's decision is frustrated by the failure of the Board to adhere to the law, the proper recourse of the reviewing court is to remand the proceedings to the Board. *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-43, 444 (1965). "[T]he case must be remanded to permit the Board to apply the proper legal standard . . . ." *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974).

Enforcement of the order is denied and the proceedings are remanded for further consideration consistent with this order and with the *Hendricks* case.

CUDAHY, *Circuit Judge*, Dissenting in part.

I respectfully dissent. Although I am constrained by *Hendricks County Rural Electric Membership Corp.* v. *N.L.R.B.*, 603 F.2d 25 (7th Cir. 1979) (*"Hendricks I"*) to concede that in this Circuit "confidential secretaries" are excluded from the Act (whether or not their duties are labor relations-related), neither *Hendricks I* nor *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) requires such a concession in the case of "confidential employees" in general. *See Hendricks County Rural Electric Membership Corp.* v. *N.L.R.B.*, No. 80-1283 (7th Cir. July —, 1980) (Cudahy, J., dissenting) (*"Hendricks II"*).

Only one of the challenged employees here is a secretary, Arlene Oelke. Oelke is the assistant and secretary to the manager of industrial sales. In her case a remand might be needed to apply the new test of *Hendricks I* and *Hendricks II*, which does not require that the alleged confidential relationship involve labor relations.

I fear that the application of the majority's new test for excluded "confidential employees" may demonstrate both its lopsidedness in principle and its potentially sweeping impact on the statutory protection, particularly of white collar workers. *See Union Oil Company of California* v. *N.L.R.B.*, 607 F.2d 852, 853 (9th Cir. 1979).

APPENDIX G

Unpublished Per Curiam Order

NLRB JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 21, 1980

Before
HON. ROBERT A. SPRECHER, Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. WILLIAM J. CAMPBELL, Senior District Judge *

No. 79-1991

MALLEABLE IRON RANGE COMPANY, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A Petition for Review of an Order from the
National Labor Relations Board

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that enforcement of the order of the National Labor Relations Board reviewed in this matter be, and the same is hereby, DENIED and the proceedings are REMANDED, with costs, in accordance with the order of this court filed this date.

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

APPENDIX H

JMT
D—5462
Beaver Dam, WI

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 30—CA—5206

MALLEABLE IRON RANGE COMPANY

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 39,
AFL—CIO—CLC

DECISION AND ORDER

Upon a charge filed on May 8, 1979, by Office and Professional Employees International Union, Local 39, AFL—CIO—CLC, herein called the Union, and duly served on Malleable Iron Range Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint on May 17, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 5, 1979, following a Board election in Case 30—RC—3482 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about May 1, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 29, 1979, Respondent filed a motion to dismiss the complaint because it failed to set forth a notice of hearing or in the alternative to fix an answer date. On June 8, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.[2]

On June 25, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 29, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should

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[1] Official notice is taken of the record in the representation proceeding, Case 30-RC-3482, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Thus, it appears Respondent abandons its motion to dismiss the complaint.

not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition to the Motion for Summary Judgment, Respondent admits that the Union has requested that it bargain and that it has refused to do so, but contends that the certification of the Union is invalid because the unit certified is inappropriate for the purposes of collective bargaining.

Review of the record herein, including that in the representation proceeding, Case 30—RC—3482, establishes that, upon a petition duly filed under Section 9(c) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board. Thereafter, the Regional Director issued a Decision and Direction of Election, wherein he found that the petitioned-for unit of all full-time and regular part-time office and clerical employees, technical employees, and professional employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act, and all other employees in bargaining units represented by other labor organizations, constitutes an appropriate unit for the purposes of collective bargaining, and directed that

an election by secret ballot be conducted among the employees in that unit. The Regional Director further directed that a separate ballot be used for recording the vote of the one professional employee and that, if said employee did not vote for inclusion in the unit with nonprofessional employees, a unit confined to office, clerical, and technical employees, excluding professional employees, would be appropriate for the purposes of collective bargaining.

Respondent filed a timely request for review and brief in support of the request for review of the Regional Director's Decision and Direction of Election, alleging, in substance, that the Regional Director made erroneous factual conclusions that a number of employees were not managerial employees or supervisors and that, by including these employees in the unit, the Regional Director departed from reported precedent requiring that managerial employees be excluded from the collective-bargaining unit. By telegraphic order of March 22, 1979, the Board denied Respondent's request for review.

On March 28, 1979, a secret-ballot election was conducted among employees in the aforementioned bargaining unit. The one professional eligible voter cast a valid ballot against inclusion with nonprofessionals. With respect to the remaining ballots, the tally was 40 for, and 15 against, the Union; there were no challenged ballots. Thus, a majority of the employees of Respondent in the appropriate unit, excluding professional employees, selected the Union as their representative for purposes of collective bargaining. On April 5, 1979, the Regional Director issued a Certification of Representative.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special

circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Wisconsin corporation with its principal place of business in Beaver Dam, Wisconsin, is engaged in the manufacturing of castings and appliances and jobbing work. Respondent, in the course

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c). On July 11, 1979, Respondent filed a motion entitled "Motion to Reopen Record to Admit Exhibit as Newly Discovered Evidence." On July 23, 1979, the General Counsel filed a motion in opposition to Respondent's motion. The Board hereby denies Respondent's motion, as the evidence Respondent seeks to present does not constitute newly discovered evidence of which it was excusably ignorant.

and conduct of its business, annually derives gross revenues in excess of $50,000 from selling and shipping goods and materials, in interstate commerce, from its Wisconsin location directly to points outside the State of Wisconsin.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Office and Professional Employees International Union, Local 39, AFL—CIO—CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office and clerical employees and technical employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations.

2. The certification

On March 28, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 30, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on April 5, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 27, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 1, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 1, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding a signed agreement.[4]

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*,

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[4] The General Counsel's request that the Board order Respondent to pay to the Board and the Union reasonable costs and expenses incurred by them in the investigation of this case including reasonable counsel fees and expenses is hereby denied as lacking in merit.

140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record makes the following:

Conclusions of Law

1. Malleable Iron Range Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Office and Professional Employees International Union, Local 39, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time office and clerical employees and technical employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since April 5, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about May 1, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has en-

gaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Malleable Iron Range Company, Beaver Dam, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees International Union, Local 39, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time office and clerical employees and technical employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Beaver Dam, Wisconsin, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 21, 1979

HOWARD JENKINS, JR., Member

BETTY SOUTHARD MURPHY, Member

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees International Union, Local 39, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time office and clerical employees and technical employees employed at the Employer's Beaver Dam, Wisconsin, facility, but excluding professional, managerial, and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all

other employees in bargaining units represented by other labor organizations.

MALLEABLE IRON RANGE COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, Suite 230, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414-291-3866.

APPENDIX I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Beaver Dam, Wisconsin

Case No. 30-RC-3482

MALLEABLE IRON RANGE COMPANY,[1] EMPLOYER

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 39,
AFL—CIO—CLC,[2] PETITIONER

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (herein called the Act), a hearing was held before a Hearing Officer of the National Labor Relations Board (herein called the Board). The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

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[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as amended at the hearing.

Upon the entire record in this proceeding,[3] the undersigned finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Employer is a Wisconsin corporation engaged in the manufacturing of castings and appliances and jobbing work at its Beaver Dam, Wisconsin location. Petitioner seeks to represent all full-time and regular part-time office clerical, technical and professional employees employed by the Employer, but excluding all managerial and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations. The Employer, while not disputing the appropriateness of a unit whose scope is limited to office clerical employees, would exclude technical, professional and

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[3] The Petitioner has timely filed a brief which has been duly considered. At the close of the hearing, the Hearing Officer ordered that briefs be submitted to the undersigned by the close of business February 6, 1979 (all dates are 1979). Thereafter, on February 1, the Employer requested an extension of time to March 1 to submit its brief. An extension to February 15 was granted. On February 9 the Employer sought yet another extension to February 26, which request was denied. Ultimately the Employer did submit a brief, albeit untimely. Nevertheless, I have considered the facts and arguments advanced by the Employer both in its brief and at the hearing.

confidential employees and both inside and outside sales personnel.

The Employer employs approximately 450 individuals at its Beaver Dam facility. Of these, approximately 265 employees in the factory are represented by Local 1953, International Brotherhood of Electrical Workers. The recognition clause of the current contract between Local 1953 and the Employer provides:

> The company recognizes the union as the sole collective bargaining agent for its production and maintenance employees, including pattern shop employees, but excluding foundry employees, office clerical employees, time study men, shop clerks, guards, professional employees, executives and sub-executives, foremen and other supervisors as defined in the Labor Management Relations Act.

In addition Local 34, International Molders and Allied Workers Union, AFL-CIO represents approximately 100 employees in the Employer's foundry. The recognition clause of the current contract between Local 34 and the Employer provides:

> The company recognizes the union as the sole collective bargaining agent for its foundry and production and maintenance employees, excluding executives, subexecutives, foremen, time study men, shop or time clerks, apprentices or trainees, guards, salesmen, or office and clerical employees.

As noted, Petitioner herein seeks an official clerical, professional and technical unit which appears to be a residual unit of those nonsupervisory employees employed at the Employer's Beaver Dam facility. There is no evidence of any bargaining history in the peti-

tioned-for unit. No other union seeks to represent these employees and certain categories of employees (e.g., time study men) are specifically excluded from the currently represented bargaining units. Much evidence was elicited by the Employer concerning the status of numerous employees to determine whether they are technical, professional, managerial, supervisory or confidential. The Act requires in Board certified units that supervisory employees be excluded from employee bargaining units. The Supreme Court has interpreted the Act to require the exclusion of managerial employees. *N.L.R.B.* v. *Bell Aerospace, Division of Textron, Inc.*, 416 U.S. 267 (1974). Board policy requires the exclusion of confidential employees. *Ladish Co.*, 178 NLRB 90. On the other hand technical employees may be included in an office clerical unit where the two groups share a sufficient community of interest. *Siemens Corp.*, 224 NLRB 1579. Similarly where professional employees share a community of interest with nonprofessional employees, the two groups may be combined into a single unit provided the professional group is afforded a self-determination election, as provided for in Section 9 (b) (1) of the Act. *Sonotone Corporation*, 90 NLRB 1236. It appears that those employees sought by Petitioner, including those who might be classified as either technical or professional employees, work in the same general area as the office clerical employees, have the same fringe benefits, have daily contact with office clerical employees, share common supervision and are involved in seeing that the Employer's product is produced. Accordingly and inasmuch as no other union seeks to represent these employees, I find that the scope of the unit sought by Petitioner is appropriate. Because there may be issues relative to the

scope of the unit raised at a later time, I will pass on whether employees are technical or professional. There remains the question of unit placement.

Technical Services Section:

There are eight employees in the technical services section (research and development department) whom the Employer would exclude from the unit. The Employer claims that Herbst, Kostolni, Lehmann, Heidemann, Kaiser and W. Murphy are technicals. The Employer also asserts Murphy is a supervisor. The Employer would exclude Nagarkar as a professional. Herbst, Kostolni and Lehmann are all draftsmen. Lehmann, who is the most experienced of the three, runs blueprints on a copy machine and also designs blueprints. Herbst and Kostolni perform the same work as Lehmann but for outside jobs. Lehmann had 3 years of high school drafting. Kostolni had 4 years of high school drafting and Herbst had vocational school drafting after high school, but he learned his job responsibilities during his 24 years with the Employer. T. Kaiser is the solid fuel development engineer. There is no evidence Kaiser has an advanced degree or training. He performs all of the "engineering functions" for the solid fuel division which includes decisions to make or buy parts. He also does "paper work" in listing and classifying appliances for Underwriter's Laboratories. L. G. Heidemann is quality control engineer for technical services and sees to it that the Employer's gas appliances meet the American Gas Association Standards. Heidemann has taken college courses in mathematics and English but apparently has no degree. W. Murphy puts in writing the methods by which the appliances will be manufactured which ultimately is converted into a

computer program. His job essentially entails that the most efficient methods are utilized to minimize production costs and maximize production. Nagarkar, who is the only individual in dispute who has an engineering degree, is involved with electrical appliances at Underwriter's Laboratories and the Canadian Standards Association. The generalized testimony concerning Kaiser, Heidemann and Nagarkar reveals that their function apparently is to monitor various codes and insure that they are complied with by ordering the proper parts for goods in process or planned. Murphy is a coordinator for the production process. The head of technical services, James Polzin, testified that his job does not require a degree but only technical school training or experience. Based on the entire record, I conclude these employees are technicals. As technicals, they should nevertheless be included in the unit, as they come in contact with office employees and have a significant community interest with office clerical employees, as described above. With respect to Murphy, the Employer also asserts he is a supervisor. Murphy "supervises" only one employee—his secretary. There is no evidence, however, Murphy possesses any of the indicia of supervisory authority except the power to grant time off to his secretary and there is no evidence he has ever exercised that authority. I find and conclude that Murphy is not a supervisor within the meaning of the Act and is included in the unit.

Consumer Products Marketing Section:

The Employer disputes the placement of several individuals who are classified in this section. The Employer contends that Margaret Schmitt, Susan Putnam and Lola Kuzniewicz, all of whom work in

distribution and service, are confidential employees. The Employer also asserts Kuzniewicz is a managerial employee. Schmitt is salaried and handles all paperwork relative to warehouse stock, Putnam is hourly paid[4] and performs dispatch functions such as routing shipments and making up bills of lading. Lola Kuzniewicz handles incoming mail, answers phone calls from dealers and distributors and processes credits. This latter function is routine and is done in accordance with Employer's warranty policy. All three perform clerical functions and none of them work in a confidential capacity for a person involved in the formulation, determination and effectuation of the Employer's labor relations policies. That they have access to certain customer or supplier information—information which the Employer believes should be kept confidential—does not render them "confidential employees" as that term has been used by the Board. Union membership is not incompatible with an employee's duty of loyalty to her employer, even when the duty involves a responsibility to maintain confidentiality. *Dun & Bradstreet, Inc.*, 194 NLRB 9. I find, therefore, Schmitt, Putnam and Kuzniewicz are not confidential employees. Nor do I find Kuzniewicz to be a managerial employee, as her issuance of credits is done on a routine basis without any discretion independent of the Employer's established policy.

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[4] Testimony revealed that some unrepresented employees are salaried, while others are hourly paid. There is no consistent pattern to indicate what accounts for the difference except that new employees are generally hourly paid, while more senior employees are generally salaried. Some part-time employees are hourly paid while others are on salary.

The Employer contends Brian Christopherson, the assistant in advertising, should be excluded as managerial employee. Likewise, the Employer would exclude Sharon Neumann as a confidential, managerial employee and Lawrence Keegstra and M. Wallendal as technicals. The Employer also asserts Keegstra is a supervisor. Christopherson writes copy for advertising and coordinates the advertising function with other departments and with the media. There is no evidence Christopherson formulates and effectuates *management* policies by expressing and making operative the decisions of the Employer. Nor does it appear Christopherson has discretion in the performance of his job independent of the Employer's established policy. He therefore is not a managerial employee. *General Dynamics Corp., Convair Aerospace Div.*, 213 NLRB 851. I shall include him in the unit. Neuman works in the mail room and opens mail. Such activity does not vest an employee with either confidential or managerial status. She is also included in the unit. Both Keegstra and Wallendal work in the Employer's print shop and handle all the Employer's inhouse printing. Printers are not technical employees, as that term is used by the Board. Nor is Keegstra a supervisor. Keegstra has none of the indicia of supervisory authority except the asserted power to "reprimand" Wallendal which he has never done. Keegstra earns 20 percent more pay than Wallendal but that appears to be the result of his greater experience. I conclude therefore that both Keegstra and Wallendal are properly included in the unit and eligible to vote in the election.

The Employer asserts that H. Turner, the custodian, is not a clerical employee and should be excluded from the unit. Turner is responsible for clean-

ing the basement level of the office and is hourly paid. Turner works from 1 p.m. to Midnight, while the office normally closes at 4:30 p.m. Turner is supervised by Donald Dohmann, the manager of advertising, and Turner receives the same vacation, holidays and medical insurance as administration and clerical employees. His duties daily bring him into the office areas. Turner does not do any work in the production areas of the plant. Based on all of the above, I conclude that Turner, who is not represented in either existing bargaining unit, shares a sufficient community of interest with office clerical employees to warrant his inclusion in the unit.

The Employer would exclude Janet Yelk as a managerial or confidential employee. Yelk, who is hourly paid, earns $3.65 an hour and works for the manager of the parts department. She sorts mail, fills out parts orders, waits on customers who come off the street and works the switchboard for 15 minutes each afternoon. These are not the duties of a managerial or confidential employee. I shall, therefore, include her in the unit. She is eligible to vote in the election conducted herein.

The Employer would also exclude Bill Pfingsten as a confidential employee, or as an outside salesman. Pfingsten, who handles telephone sales from the Employer's Beaver Dam facility, receives a straight salary unlike outside salesmen who receive a salary plus commission. The fact that Pfingsten may have access to dealer information does not render him a confidential employee, as defined by the Board. He is, therefore, included in the unit.

Industrial Sales Section:

The Employer contends that Bernice Riske and Arlene Oelke should be excluded from the petitioned-for unit. The Employer asserts that Riske, who has the title of production control manager, is a managerial employee. The Employer's organization charts show Riske performs order entry and billing functions. Riske relays orders to the factory, maintains a file of all orders in the foundry and sees that orders are entered into the data processing system. She also writes up bills of lading. Until January 1979, she spent 4 hours per day on the switchboard. These are clerical, not managerial, functions, and I shall include her in the unit.

Oelke is alleged by the Employer to be a confidential or managerial employee. She is the assistant and secretary to the manager of industrial sales. Oelke handles all calls from outside customers concerning pricing and delivery. She performs certain dispatching functions and transfers information from purchase orders to the Employer's internal procurement forms. Oelke types all letters sent to field representatives. These are also clerical, not managerial, functions. The fact that Oelke handles certain pricing and costing information does not render her a "confidential employee" as that term is used by the Board. I shall include her in the unit.

Factory Section:

The Employer contends that Jeff Omen, T. Czeszynski and D. Thomas are plant clericals and that P. Marx, R. Binder, E. Belott and J. Grace are technical or managerial employees. The Employer also asserts that the nurse, Frank Schuster, is a professional employee who should be excluded from the unit. Omen

is a blueprint clerk who takes production releases from production control to which he attaches computer printouts of work done or to be done. Omen then routes these documents to insure production. Czeszynski and Thomas are "job loaders" who see to it that work orders or releases are timely performed to assure proper delivery to customers. They perform expediting functions in the factory. They report to the production control supervisor. Omen, Czeszynski and Thomas spend the majority of the day in the plant and handle paperwork necessary to production. Although the work they perform might be plant clerical in nature, it appears these individuals do share a community of interest with the office employees. Thus the job loaders share the same fringe benefits such as insurance, days off and vacation as general office employees. I also note that they are excluded from the two production and maintenance units, and that if they are not included in the petitioned-for unit, they will be unrepresented. I shall include them in the unit.

Marx, Binder, Belott and Grace are all time study engineers who have been trained on the job. Each takes time studies, effort ratings and routings. They cannot, however, change rates. While the information they collect may be used by the Employer in handling grievances which arise in the factory and in the foundry, they do not themselves resolve grievances. The training and work of the time study engineers renders them technical employees. *Plankington Packing Company*, 116 NLRB 1225, 1233-1234. Nevertheless, their pay, hours and other working conditions give them a sufficient community of interest to warrant their inclusion in an office clerical unit. The work they perform and their inability to exercise

independent judgment and discretion in key areas reveals they are not managerial employees. I shall include them in the unit.

Frank Schuster is a registered nurse who works in an office at the Employer's facility. The parties stipulated Schuster is a professional employee. The fact that he orders supplies for his nursing department and fills out forms on workman's compensation claims and insurance claims does not render him a managerial employee. Those decisions he makes concerning industrial accidents appear to be the result of his professional judgment, rather than as a result of any managerial authority vested in him. Schuster shall be included in the unit, if he so chooses.

Purchasing Section:

The Employer asserts that buyers R. Klein and C. Polzin are managerial employees. Polzin buys the steel and Klein purchases the trim items. Each must operate within parameters set by the Employer. It thus appears their discretion and latitude for independent action takes place within the confines of the Employer's general directions. I conclude that they are not managerial employees and should be included in the unit. *Bell Aerospace Co., Div. of Textron, Inc.*, 219 NLRB 384.

Controller Section:

The Employer contends that Barbara Knoll, who works in the payroll department is a supervisor, as defined in the Act. Knoll has never hired or fired anyone, has not interviewed applicants for employment and does not recommend employees for promotion. She has submitted employees' names for merit

raises, but there is no indication the recommendations were effective. Knoll reviews the time-tickets of production employees and computes their pay. She handles the paperwork relating to the vacations taken by factory and foundry employees and writes up an absence report. Knoll has not issued any written disciplinary warnings. The employees in the payroll department have certain assigned duties which they regularly perform. Knoll testified she gave out a verbal warning "quite sometime ago," but there is no specific evidence concerning the events surrounding this warning. Based on the record as a whole, I conclude that Barbara Knoll is not a supervisor within the meaning of the Act. She is included in the unit and eligible to vote in the election herein.

The Employer contends that Larry Wendlandt, the assistant manager and programmer in the electronic data processing services department, should be excluded as a supervisor or technical employee. Wendlandt has had training in programming from a school run by IBM. He has access to payroll information, inventory, accounts payable, accounts receivable, sales analysis and costing analysis all of which he may put into a program. There is no evidence that Wendlandt possesses any supervisory authority, so I shall not exclude him from the unit on that basis. Based on the entire record, it does appear he is a technical employee. *Computer Systems, Inc.*, 204 NLRB 255; *The Ohio Casualty Insurance Company*, 175 NLRB 860. I shall include him in the unit.

The Employer would exclude David Soldner as a professional or managerial employee. Soldner works as the assistant cost manager in the cost department.

He costs out range parts, factory sales parts and foundry parts and prepares invoices for IBM. He costs out jobs by calculating the Employer's material and labor costs and adding on a predetermined markup; he has access to the Employer's customers' names and sales figures. The information he obtains relative to costing comes from previously prepared cost-sheets. Soldner has a high school education and on-the-job training. There is no indication that Soldner 's job requires any of the training or skills required of a professional employee, nor is there indication he possesses any of the indicia of a supervisor or a managerial employee. I find that Soldner is not a managerial or professional employee and that he is not a supervisor. He is, therefore, included in the unit.

The Employer would exclude Linda Anderson as a supervisor or confidential employee. Anderson is a computer operator in the electronic data processing department. Anderson has access to the same information as Wendlandt and as the two keypunch operators—who the parties stipulated to be in the unit. There is no evidence Anderson is a confidential employee as that term is used by the Board. Nor is there any evidence she possesses any of the indicia of supervisory status. I conclude, therefore, that Anderson is neither a supervisor nor a confidential employee and that she should be included in the unit.

The Employer would exclude Linda Kuehn as a technical or confidential employee. Kuehn is a clerk in the cost department. She checks invoices that are returned from key punch for errors. She attaches bills of lading to the invoices and helps with the costing of range parts and outside sales parts. She has access to the cost of parts and to customer

prices. These jobs and functions are those of a clerical employee, not of a technical or confidential employee. Kuehn is included in the unit and eligible to vote in the election.

Secretary and Treasurer Section:

The Employer would exclude Dennis Krause from the unit as a professional or managerial employee. Krause is the assistant manager in the credit department. He checks in the cash each day and records it on the ledgers. He brings correspondence up to date for delinquent dealers and determines whether a dealer is delinquent by looking at the monthly statements. Krause does not determine what the Employer's credit policy is, or should be. Krause knows the amount of cash on hand for the Employer and the volume of the accounts receivable. Although Krause has a college degree in accounting, he testified that a basic bookkeeping course would cover the kind of work he does. Based on the requirements of Krause's job and his lack of ability to formulate policy for the Employer, I find Krause is neither a professional nor a managerial employee. I shall include him in the unit.

The Employer would exclude Mary Anne Schwantes as a confidential employee. Schwantes assists the chief bookkeeper and is involved in processing accounts payable. That she, like her counterpart Yelk in the parts department, has access to "sensitive [credit] data," does not render her a confidential employee. I shall include her in the unit.

Based on the above facts and circumstances, I find that a unit of all full-time and regular part-time office and clerical employees, technical employees and professional employees employed at the Employer's

Beaver Dam, Wisconsin facility, but excluding all managerial [5] and confidential employees,[6] outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations constitutes a unit appropriate for the purposes of collective bargaining within the meaning of the Act. However, as this unit includes professional and nonprofessional employees whom the Board cannot join in a single unit without the desires of the professional employee being determined in a separate vote,[7] I shall direct that a separate ballot be used for recording the vote of the registered nurse, which will ask two questions:

> (1) Do you wish to be included in the same unit as the office and clerical employees and technical employees employed by the Employer at its Beaver Dam, Wisconsin facility for the purposes of collective bargaining?
>
> (2) Do you desire to be represented for the purpose of collective bargaining by Office and Professional Employees International Union, Local 39, AFL-CIO-CLC?

If the professional employee votes yes to the first question indicating his desire to be included in the unit with the nonprofessional employees, he will be so included. His vote on the second question will then be counted with the votes of the nonprofessional employees to decide the representative for that bargain-

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[5] The parties stipulated that D. Legas is a managerial employee.

[6] The parties stipulated that A. Hupke, L. Wendt and K. Weckworth are confidential employees.

[7] *Sonotone Corporation*, 90 NLRB 1236.

ing unit. If, on the other hand, he does not vote for inclusion, his vote on the second question will not be counted, as a one-person unit may not be certified under Board practice. *Home of Guiding Hand*, 218 NLRB 1278, 1280.

Accordingly, I find the following unit to be appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office and clerical employees, technical employees and professional employees [8] employed at the Employer's Beaver Dam, Wisconsin facility, but excluding managerial and confidential employees, outside sales personnel, guards and supervisors as defined in the Act and all other employees in bargaining units represented by other labor organizations.

DIRECTION OF ELECTIONS

Election by secret ballot shall be conducted by the undersigned among the employees in the nonprofessional and the professional voting groups found described above at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because

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[8] If, however, the professional employee does not vote for inclusion in the unit with nonprofessional employees, I find a unit confined to office and clerical and technical employees, excluding professional employees to be appropriate for purposes of collective bargaining.

they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election dates and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. In the nonprofessional group those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Office and Professional Employees International Union, Local 39, AFL-CIO-CLC. For the professional employee, the same choice will appear, as well as the propositions set forth above.

LISTS OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list for the non-

professional voting group and for the professional employee, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such lists must be received in the Regional Office, Suite 230, Commerce Building, 744 North Fourth Street, Milwaukee, Wisconsin 53203 on or before March 6, 1979. No extension of time to file these lists may be granted, nor shall the filing of a request for review operate to stay the filing of such lists except in extraordinary circumstances. Failure to comply with the requirement shall be grounds for setting aside the elections whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 12, 1979.

Dated at Milwaukee, Wisconsin this 27th day of February 1979.

/s/ George Squillacote,
GEORGE SQUILLACOTE,
Regional Director
National Labor Relations Board
Thirtieth Region
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